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(132)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted] 244

MIKE BLANSET, APPELLANT,

vs.

OSCAR CARDIN, AS GUARDIAN OF JESSE DAYLIGHT, A MINOR, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 7, 1921.

(27,470)

(27,470)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 715.

MIKE BLANSET, APPELLANT,

vs.

OSCAR CARDIN, AS GUARDIAN OF JESSE DAYLIGHT, A MINOR, ET AL.

PPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1919, of said Court, before the Honorable Walter H. Sanborn and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable Thomas C. Munger, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the eleventh day of March, A. D. 1919, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Mike Blanset was Appellant and Oscar Cardin, as Guardian of Jesse Daylight, a Minor, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit under the supervision of its Clerk, is in the words and figures following, to-wit:

1 In the United States District Court for the Eastern District of Oklahoma.

Pleas and Proceedings before the Honorable Frank A. Youmans, Judge of the District Court for the Western District of Arkansas, Presiding by Assignment.

(*Amended Bill of Complaint.*)

In the District Court of the United States for the Eastern District of Oklahoma.

No. 2536. Equity.

MIKE BLANSET, Plaintiff,

vs.

OSCAR CARDIN, as Guardian of Jesse Daylight, a Minor; L. M. Blanton, as Guardian of Clayton C. Daylight, a Minor; Oscar Cardin, as Guardian [*as*] Litem for Emma Louise Blanset, a Minor, Defendants.

Plaintiff complains of the defendants, and for cause of action alleges:

I.

That the plaintiff, Mike Blanset, is a white man, and is a citizen and resident of the State of Missouri, residing at Joplin, Jasper County, Missouri; that the defendants and each of them and their respective wards are citizens of the State of Oklahoma, residing in Ottawa County, Oklahoma; that the amount in controversy as herein alleged in this suit is in excess of the sum of Three Thousand Dollars exclusive of interest and costs.

II.

That this suit is one of a civil nature at common law of which the District Court of the United States has original jurisdiction, and that it involves a Federal question in this, to-wit: The construction of the Act of Congress approved June 25, 1910, as amended by the Act of Congress approved February 14, 1913, entitled respectively "An Act To Provide For Determining The Heirs Of Deceased Indians, For The Disposition And Sale Of Allotments Of Deceased Indians, For The Leasing Of Allotments, And For Other Purposes," and "An Act Regulating Indian Allotments Disposed Of By Will," in so far as it relates to the disposition by will
2 of allotments of the Quapaw Tribe of Indians [allot-ed] to them under the Act of Congress approved March 21, 1895 (28 Stats. at Large, p. 907), all of which more fully appears by subsequent allegations of this petition, the specific question being whether or not an allottee of the Quapaw Tribe of Indians, receiving her [allot-ed] lands under the said Allotment Act with a restriction upon alienation for the period of twenty-five years, can under the said Acts of June 25, 1910, and February 14, 1913, by will, with the approval of the Secretary of the Interior lawfully disinherit her lawful husband, a white man, by willing all of her property to her children in violation of the provisions of Section 8341 of the Revised Laws of the State of Oklahoma, providing that "no woman shall while married, devise away from her husband more than two-thirds of her property."

IV.

That the said Act of Congress approved March 2, 1895 (28 Stats. at Large, P. 907), under which the said Quapaw Indians received their allotments, is as follows, to-wit:

"That the allotments of land made to the Quapaw Indians in the Indian Territory, in pursuance of an Act of the Quapaw National Council, approved March twenty-third, eighteen hundred and ninety-three, be and the same are hereby ratified and confirmed,

ubject to revision, correction and approval by the Secretary of the nterior, Provided, However, That any allottee who may be dis-atisfied with his allotment shall have all the rights to contest the ame provided for in said Act of the Quapaw National Council ubject to revision, correction and approval by the Secretary of the nterior. And the Secretary of the Interior is hereby authorized o issue patents to the said allottees in accordance therewith: Pro-ided, that said allotments shall be inalienable for a period of twenty-ive years from and after the date of said patents: And Provided urther, That the surplus lands on said Reservation, if any, may e allotted from time to time, by the said tribe to its members, nder the above entitled Act."

That the Act of Congress approved February 14, 1913, amending he said Act of June 25, 1910, is as follows, to-wit:

"Sec. 2. That any persons of the age of twenty-one years having ny right, title, or interest in any allotment held under trust or ther patent containing restrictions on alienation or individual ndian moneys or other property held in trust by the United States all have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the ecretary of the Interior: Provided, However, that no will so executed shall be valid or have any force or effect unless and until it all have been approved by the Secretary of the Interior: Provided urther, That the Secretary of the Interior may approve or disapove the will either before or after the death of the testator, and n case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution r procurement of the will the Secretary of the Interior is hereby uthorized within one year after the death of the testator to cancel he approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the tate wherein the property is located."

That Section 1 of the Act of June 25, 1910, of which the Act of ebruary 14, 1913, is amendatory, is as follows:

"That when any Indian to whom an allotment of land has been ade, or may hereafter be made, dies before the expiration of the rust period and before the issuance of a fee simple patent, without aving made a will disposing of said allotment as hereinafter proided, the Secretary of the Interior, upon notice and hearing, under uch rules as he may prescribe, shall ascertain the legal heirs of such decedent."

That Section 8311 of the Revised Laws of the State of Oklahoma f 1910 is as follows, to-wit:

"What May Be Disposed of by Will.—Every estate and interest in eal or personal property to which heirs, husband, widow, or next of

kin might succeed, may be disposed of by will. Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband; provided further, that no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will."

V.

That he is the owner, both at law and in equity of an undivided one-third interest in and to the following lands situated in the Eastern District of Oklahoma, to-wit:

The Northwest Quarter (NW. ¼) of the Southeast Quarter (SE. ¼), and the North One-half (N. ½) of the Southwest Quarter (SW. ¼) in Section Two (2), Township Twenty-eight (28), Range Twenty-Four (24), East of the Indian Meridian, Ottawa County, Oklahoma.

That he is also the owner, both at law and in equity, of an undivided one-third interest in and to the interest of Fannie Crawfish Blanset, deceased, in and to the following described land situated in the Eastern District of Oklahoma, to-wit:

The West One-half (W. ½) of the Southwest Quarter (SW. ¼) and the North One-half (N. ½) of the Northeast Quarter (NE. ¼) of the Southwest Quarter (SW. ¼), and the Southwest Quarter (SW. ¼) of the Southeast Quarter (SE. ¼), of Section Thirty-one (31), Township Twenty-nine (29) Range Twenty-four (24), East of the Indian Meridian, Ottawa County, Oklahoma; and the Southwest Quarter (SW. ¼) of the Southeast Quarter (SE. ¼) of Section Twenty (20), Township Twenty-nine (29), Range Twenty-five (25), East of the Indian Meridian, Ottawa County, Oklahoma.

That he is also the owner, both at law and in equity, of an undivided one-third interest in and to any and all other property, of whatsoever name and nature, of which the said Fannie Crawfish Blanset died seized or possessed.

VI.

Plaintiff deraigns title to the land and other property described and referred to in Paragraph V hereof, in the following manner: He was lawfully married to the said Fannie Crawfish Blanset on August 3rd, 1906, at Lincolnville, Oklahoma; that said Fannie Crawfish Blanset died on February 22nd, 1916, seized and possessed of the entire estate in and to the following described lands, which were her allotment as Quapaw allottee Numbers 95 and 97, to-wit:

The Northwest Quarter (NW. ¼) of the Southeast Quarter (SE. ¼), and the North One-half (N. ½) of the Southwest Quarter (SW. ¼), in Section Two (2), Township Twenty-eight (28), Range Twenty-three (23); and the Northwest Quarter (NW. ¼) of the Southeast Quarter (SE. ¼), and the Northeast Quarter (NE. ¼) of

the Southwest Quarter (SW. ¼), and the Southwest Quarter (SW. ¼) of the Northeast Quarter (NE. ¼), in Section Eight (8), Township Twenty-eight (28), Range Twenty-four (24), East of the Indian Meridian, Ottawa County, Oklahoma.

That the said Fannie Crawfish Blanset also died seized and possessed of a one-third undivided interest in and to the following lands, which interest she inherited from her mother Widow Crawfish, or Mary Crawfish, who died seized and possessed of the entire estate therein as her allotment of Quapaw lands, to-wit:

The West one-half (W. ½) of the Southwest Quarter (SW. ¼) and the North One-half (N. ½) of the Northeast Quarter (NE. ¼) of the Southwest Quarter (SW. ¼), and the Southwest Quarter (SW. ¼) of the Southeast Quarter (SE. ¼) of Section Thirty-one (31), Township Twenty-nine (29) Range Twenty-four (24), East of the Indian Meridian, Ottawa County, Oklahoma; and the Southwest Quarter (SW. ¼) of the Southeast Quarter (SE. ¼) of Section Twenty (20), Township Twenty-nine (29), Range Twenty-five (25), East of the Indian Meridian, Ottawa County, Oklahoma.

That at the time of the death of the said Fannie Crawfish Blanset, and at the time the paper-writing hereinafter referred to and marked Exhibit "A" was executed, plaintiff was her lawful husband and living with her as such, that no marriage contract in writing had prior to her said death been entered into between the parties; that there was born as the issue of said marriage, one child, a daughter, Emma Louise Blanset now about eight years of age; that the said Fannie Crawfish Blanset prior to her marriage with the plaintiff was married to one Isaac Daylight; that the issue of that marriage was two children, Jesse Daylight, who survived his mother; Mary Daylight, a daughter, who died several years prior to the death of her mother; that the decedent was lawfully divorced from Isaac Daylight prior to her marriage with this plaintiff, and the said Daylight died prior to the said marriage; that at the time of her death decedent left little or no personal property except moneys held in trust for her from the sale of inherited Indian Lands by the United States of America; that by the provisions of Section 8419 of the Revised Laws of Oklahoma for 1910, in full force at the time of the death of the said Fannie Crawfish Blanset, dower and curtesy were abolished; that by Section 8418 of said Revised Laws of Oklahoma in force at the time of her said death, it was provided as follows:

"If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, (the estate must be distributed) in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent left a surviving husband or wife, and more than one child living, or one child living, and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remaining in equal shares to his children and to the lawful issue of any deceased child by representation."

Section 6328 of the Revised Laws of Oklahoma for 1910, further provided:

"Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead, which shall not in any event be subject to administration proceedings, until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age."

That notwithstanding the provisions of said Section 8341, said Fannie Crawfish Blanset under date of February 21, 1916, made a certain paper-writing purporting to be her last will and testament devising and bequething to the plaintiff, her husband, the sum of Five Dollars, and no more, and not bequething to the plaintiff any interest of any kind or nature in and to any of the lands or property hereinbefore described, a copy of which said paper-writing is hereunto attached, marked Exhibit "A", and made a part of this Bill of Complaint.

That at the time of the death of the said Fannie Crawfish Blanset, this plaintiff was entitled to inherit and take under and pursuant to the hereinbefore mentioned laws of of the State of Oklahoma then in full force and effect.

Plaintiff alleges and shows to this Court that the value of said lands so bequeathed by the said Fannie Crawfish Blanset is in excess of the sum of Three Thousand Dollars, to-wit: In excess of One Hundred Thousand Dollars.

VII.

That notwithstanding the provisions of said Section 8341, and notwithstanding the value of the lands and other property of the estate of said Fannie Crawfish Blanset at the time of her death as hereinbefore alleged, said paper-writing was unqualifiedly approved by E. B. Meritt, Assistant Commissioner of Indian Affairs of the United States, on October 7, 1916, and by Fe Sweeney, Assistant Secretary of the Interior of the United States, on October 9, 1916, under the provisions of the Act of June 25, 1910, (36 Stats., 859), as amended by the Act of February 14, 1913, (37 Stats., 678). That the said Will so approved, has been recorded and is now on file in the Office of the Secretary of the Interior of the United States, where such Wills are properly and lawfully filed and of record.

Plaintiff shows to the Court that by the foregoing and other legislation, Congress provided that the State laws of Descent
7 should apply to Indian allotments and to interests therein, and that the Secretary of the Interior should be governed by the same. Plaintiff further shows to the Court that said Section 8341 of the Code of Oklahoma created an indefeasible descent in favor of the husband and that the will of a wife which attempts to will away from her husband more than two-thirds of her estate is therefore void and of no effect to the extent to which it attempts so to do and that in such case the husband takes by descent to the same extent.

And plaintiff further shows that by Section 8341 he is made an heir to property worth Forty Thousand Dollars of the estate of

the said Fannie Crawfish Blanset, deceased, while the said paper-writing, Exhibit "A," gives him only Five Dollars, and no more, and that in so far as the said paper-writing, Exhibit "A," attempts to deprive him of the heirship created by said Section 8341, the same is null and void and of no effect whatsoever, and that to the extent of such heirship the said Fannie Crawfish Blanset died intestate, and that the plaintiff, as the lawful husband of the said Fannie Crawfish Blanset, is an heir at law to one-third of her estate. So that the paper-writing, Exhibit "A," and the approval thereof by the Commissioner of Indian Affairs and the Secretary of the Interior are unlawful and an attempt to set at naught the laws of the United States in this petition set forth, and of other laws of the United States, which laws expressly adopt the State laws of Descent, and provide that the same shall apply to Indian allotments and interests therein.

And plaintiff further shows that notwithstanding the fact that the said paper-writing on its face attempts to deprive the plaintiff of his one-third of the entire estate, in that the said writing attempts to dispose of the entire estate, the said Commissioner of Indian Affairs and the said Secretary of the Interior unqualifiedly approved the same and thereby failed to give effect to said Section 8341 in that they both thereby declared that the said Fannie Crawfish Blanset died wholly testate. And the said Secretary of the Interior further thereby failed to give effect to said Section 8341 in that said unqualified approval by him constitutes a finding that the plaintiff is not an heir at law to said one-third, or to any part of said estate.

After said approvals had been made, plaintiff protested to the Commissioner of Indian Affairs and to the Secretary of the Interior against the said unqualified approvals, and asked, and was
8 given a re-hearing as provided by law, but both of said officials refused to cancel or modify their said finding of approval. And thereupon, the said officials again found that the testatrix died wholly testate and the Secretary again found that the plaintiff is not an heir at law to said one-third, or to any part of said estate.

Plaintiff avers, however, that in said proceedings before the Secretary of the Interior, the said Secretary found that the plaintiff was the lawful husband of the testatrix at the time of her death, and at the time she executed the said paper-writing. And the said Secretary further found that while said paper-writing is dated February 21, 1916, it was in fact executed on the day of her death, to-wit: February 22, 1916.

VIII.

The defendants thereto are all sued herein as devisees under said paper-writing, Exhibit "A." Notwithstanding the provisions of said Section 8341, the defendant Jesse Daylight, is now claiming to be the owner of the entire estate in the Northeast Quarter ($NE\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) and the Northwest Quarter ($NW\frac{1}{4}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section Eight (8), Township Twenty-eight (28), North, Range Twenty-four (24) East; and the

defendant, Emma Louise Blanset, is now claiming to be the wner of the entire estate in the Southwest Quarter (SW¼) of the Northeast Quarter (NE¼) of Section Eight (8), Township Twenty-eight (28), North, Range Twenty-four (24), East, and the Northeast Quarter (NE¼) of the Southwest Quarter (SW¼) of Section Two (2) Township Twenty-eight (28) North, Range Twenty-three (23) East; and the defendant, Clayton C. Daylight, is now claiming to be the owner of the entire estate in the Northwest Quarter (NW¼) of the Southeast Quarter (SE¼), of Section Two (2), Township Twenty-eight (28), North, Range Twenty-three (23), East. And notwithstanding the provisions of said Section 8341, and the value of said estate as alleged herein, each of the defendants is now claiming to be the owner of a one-third undivided interest in and to all of the remaining restricted lands, inherited, or otherwise, of which the said Fannie Crawfish Blanset died possessed, the description of which is given in Paragraph VI hereof, and each of said defendants is claiming to be the owner of a one-third interest in and to all trust funds held by the United States to the use and benefit of the said Fannie Crawfish Blanset. All of said claims of the defend-
9 ants are made under and by virtue of the said paper-writing Exhibit "A," as approved by the Secretary of the Interior of the United States, as hereinbefore set forth.

IX.

That by virtue of said Section 8341 of the Code of Oklahoma, the said paper-writing, Exhibit "A," the approval thereof by the Commissioner of Indian Affairs and the Secretary of the Interior, and the claims of the defendants thereunder, are all and each of them contrary to law and to the rights of the plaintiff herein, in that they attempt to deprive the plaintiff of a one-third undivided interest in and to the lands and other property of which the said Fannie Crawfish Blanset died seized and possessed. And the said paper-writing, the said approvals thereof, and the said claims of the defendants thereunder, all and each of them, constitute clouds upon the title of plaintiff to said one-third undivided interest and should be removed as such.

And each of said defendants under said Will claim [*come*] right, title or interest in and to the said one-third interest of the plaintiff in and to the lands and all other said property, which claims constitute clouds upon plaintiff's title to said one-third interest.

Wherefore: Plaintiff prays judgment as follows:

First. That the plaintiff be decreed to be the owner, both at law—in equity, of an undivided one-third interest in and to all lands and all other property of which his said wife died seized or possessed, free and clear from all claims and demands of the defendants and each of them.

Second. That the paper-writing of which Exhibit "A" hereto is a copy, and the purported approvals thereof by the Commissioner of Indian Affairs and the Secretary of the Interior, may be declared

null and void, cancelled and held for naught, and may be declared to be clouds upon the title of the plaintiff and removed as such, in so far as the same or any of them attempts to deprive the plaintiff of said one-third undivided interest or any portion thereof.

Third. That the claims of the defendants and each of them to plaintiff's said one-third interest be held without warrant, force or effect, and that plaintiff's title to said one-third interest in said property be forever quieted against the said claims of the defendants, and each of them.

Fourth. That the said defendants, and each of them, be forever enjoined from asserting or claiming under said paper-writing or under any claim by them herein asserted, any right, title or interest in or to plaintiff's said one-third interest in said property.

Fifth. That the Court may appoint a guardian ad litem herein for the defendant, Emma Louise Blanset, who is a minor, to the end that her interests herein may be amply protected.

Sixth. That the plaintiff may have such other and further relief as the nature of the case may require, or as to the Court shall seem fit and proper.

HENRY C. LEWIS,
Washington, D. C.;
PAUL A. EWERT,
Joplin, Mo.,
Solicitors for Plaintiff.

STATE OF MISSOURI,
County of Jasper, ss:

Paul A. Ewert, being first duly sworn, deposes on his oath and says that he is one of the Attorneys for the plaintiff in the above and foregoing suit; that he prepared and knows the contents of the above and foregoing Amended Bill of Complaint and knows the contents thereof, and that the matters and things stated therein as true are true, and as to those stated upon information and belief, he verily believes them to be true.

——— ———.

Subscribed and sworn to before me this — day of October, 1918.

———— ————,
Notary Public, Jasper County, Missouri.

My commission expires —.

(EXHIBIT A.)

Will.

I, Fannie Crawfish-Blanset, Quapaw allottee, Nos. 95 & 97, being of sound mind and memory, but sensible of the uncertainty of life,

and desiring to make disposition of my property and affairs, d
hereby make, publish, and declare the following to be my last wi
and testament, hereby revoking and cancelling all other or forme
wills by me at any time made.

11 1. I direct the payment of all my just debts and funera
expenses.

2. I give and devise to my husband, Mike Blanset, the sum o
Five ($5.00) Dollars to be paid in money from the rentals, incom
or proceeds of sale derived from my undivided interest in my de
ceased mother's allotment.

3. I give and devise to my son, Jesse Daylight, the NE. 4 of th
SW. 4 and the NW. 4 of the SE. 4 of Section 8, township 28, North
and Range 24, East. To my daughter, Emma Louise Blanset, th
SW. 4 of the NE. 4 of Section 8, Town-ship 28, North an
Range 24 and the NE 4 of the SW. 4 of Section 2, Townshi
28, North and Range 23, East, and to my grandson Clayton C. Day
light the NW. 4 of the SW. 4 of Section 2, township 28, North an
Range 23, East, and I further give and devise to Jesse Daylight
Emma Louise Blanset and Clayton C. Daylight in equal portions, al
my remaining restricted lands, inherited or otherwise that I may die
possessed of, also all trust funds that may be held by the United
States for me.

In witness whereof, I, Fannie Crawfish-Blanset, have to this my
last will and testament consisting of one sheet of paper, subscribed
my name this 21. day of February, 1916.

FANNIE CRAWFISH-BLANSET.

Her name was written by me at her request.

IRA C. DEAVER.

Subscribed by Fannie Crawfish-Blanset, in the presence of each of
us, the undersigned, and at the same time declared by her to us to
be her last will and testament, and we, thereupon at the request of
Fannie Crawfish-Blanset, in her presence and in the presence of each
other, sign our names hereto as witnesses this 21st day of February
1916, at her place of residence on the Quapaw Reserve, Quapaw
Agency, Oklahoma.

IRA C. DEAVER.
THOMAS CRAWFISH.
SUSAN CRAWFISH.

39016-1916.

Department of the Interior,

Office of Indian Affairs.

F. Oct. 7, 1916.

The within will of Fannie Crawfish Blanset, xx Quapaw allottee
=95 and =97, is hereby recommended for approval in ac-
12 cordance with the provisions of the Act of June 25, 1910 (36
Stats. L. 855-859) as amended by the Act of Feb. 14, 1913
(37 Stats. L. 678)

E. B. MERRITT,
Assistant Commissioner.

Department of the Interior.

Office of the Secretary,

Oct. 9, 1916.

The within will of Fannie Crawfish Blanset, Quapaw allottee =95 and =97, is hereby approved in accordance with the provisions of the Act of June 25, 1910 (36 Stats. L. 855-859) as amended by the Act of Feb. 14, 1913 (37 Stats. L. 678).

RO SWEENEY,
Assistant Secretary.

Endorsed: Filed in the District Court on October 29, 1918.

(*Motion to Dismiss Bill of Complaint.*)

Come now the defendants above named, and move the Court to dismiss the bill of the plaintiff filed herein, for that said bill does not state facts sufficient to constitute a valid cause of action in equity in favor of plaintiff and against said defendants.

A. C. WALLACE,
Attorney for Defendants

Endorsed: Filed in the District Court on November 16, 1918.

(*Decree of the District Court, December* 17, 1918.)

No. 2536-E.

MIKE BLANSET, Plaintiff,

vs.

OSCAR CARDIN, as Guardian of Jesse Daylight, a Minor; L. M. Blanton, as Guardian of Clayton C. Daylight, a Minor; and Oscar Cardin as Guardian ad litem for Emma Louise Blanset, a Minor, Defendants.

The defendants' motion to dismiss the amended bill of complaint filed by the plaintiff herein, upon the ground that the bill does not state facts sufficient to constitute a valid cause of action in equity

in favor of the plaintiff and against the defendants, duly coming on for hearing before this Court on Monday, the 2nd day of De-
13 cember, 1918, the plaintiff being represented by his attorney, Paul A. Ewert, and the respective defendants being represented by their attorney, A. C. Wallace, and arguments having been adduced in behalf of and against the said motion, and heard by me,

It is therefore, considered, adjudged and Decreed That the defendants' motion to dismiss the plaintiff's amended bill upon the grounds stated in said motion should be granted; and the plaintiff's amended bill of complaint is dismissed upon the grounds stated in said motion.

To which judgment, order and decree of the Court, the plaintiff duly asks and is allowed his exception.

Dated this 17 day of December, 1918.

FRANK A. YOUMANS,
District Judge.

(Petition for and Order Allowing Appeal.)

To the Honorable Robert L. Williams, Judge of the United States District Court for the Eastern District of Oklahoma:

The above named Complainant, feeling himself aggrieved by the order and decree made and entered in this cause on the 17th day of December, 1918, does hereby appeal from said decree and order to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that his appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree and order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri.

And your petitioner further prays that the proper order touching the security required of him to perfect his appeal be made.

PAUL A. EWERT,
HENRY LEWIS,
Attorneys for Complainant.

14 The above petition presented in open Court is granted and the appeal bond therewith submitted, hereby approved this 26th day of February, 1919.

R. L. WILLIAMS,
Judge, U. S. District Court,
Eastern District of Oklahoma.

Endorsed: Filed in the District Court on February 26, 1919.

(Assignment of Errors.)

Now, on this 26th day of February, 1919, comes the complainant, Mike Blanset, by his solicitors, Paul A. Ewert and Henry C. Lewis, and says that the decree entered in the above entitled cause on the

17th day of December, 1918, is erroneous and unjust to the complainant.

First. Because the Court erred in allowing and granting the defendants' Motion to Dismiss filed herein.

Second. Because the Court erred in dismissing Complainant's Bill herein, as prayed for in defendant's motion.

Wherefore, Complainant prays that the said order and decree be reversed, and the District Court be instructed to enter an order overruling and denying defendants' motion filed herein.

PAUL A. EWERT,
HENRY LEWIS,
Solicitors for Complainant.

Endorsed: Filed in the District Court on February 26, 1919.

(Bond on Appeal.)

Know all men by these presents:

That we, Mike Blanset, as principal, and Paul A. Ewert as surety, acknowledge ourselves to be jointly indebted to Oscar Cardin, as Guardian of Jesse Davlight, a Minor, L. M. Blanton, as Guardian of Clayton C. Davlight, a Minor, and Oscar Cardin, as Guardian ad litem for Emma Louise Blanset, a Minor, appellees in the above cause, in the sum of Two Hundred and Fifty Dollars ($250.00), conditioned that,

Whereas, on the 17th day of December, 1918, in the District Court of the United States for the Eastern District of Oklahoma, in a suit pending in that Court, wherein Mike Blanset was complain-
15 ant, and Oscar Cardin, as Guardian of Jesse Davlight, a Mminor, L. M. Blanton, as Guardian of Clayton C. Davlight, a minor, and Oscar Cardin, as Guardian ad litem for Emma Louise Planset, a Minor, were defendants, numbered on the Equity Docket as No. 2536, a decree was rendered against the said Mike Blanset, complainant, and the said complainant, having obtained an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and filed a copy thereof in the office of the clerk of the court, to reverse the said decree, and citation directed to the said defendants above named, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Eighth Circuit, to be held in the City of St. Louis, in the State of Missouri, sixty days from and after the date hereof.

Now, if the said Mike Blanset should prosecute his appeal to effect and answer to all costs, if he fails to make his pleas good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] MIKE BLANSET.
[SEAL.] PAUL A. EWERT.

Approved:
R. L. WILLIAMS,
District Judge.

Endorsed: Filed in the District Court on February 26, 1919.

(Pracipe for Transcript and Waiver of the Issuance and Service of Citation, etc.)

To R. P. Harrison, Clerk of Said Court:

You are hereby requested to make a transcript of record, to be filed in the Circuit Court of Appeals for the Eighth Circuit pursuant to the petition for appeal granted and allowed in this case by the Court, and to include in such transcript of record the following, and no other papers, to wit:

Complainant's amended bill of complaint.
Defendants' motion to dismiss.
Order of the Court granting defendants' motion.
Journal Entry.
Petition for appeal and order of Court granting said appeal.
Assignment of Errors.
Bond in Appeal.

16 Together with minutes of the Court, setting forth the filing of said papers and the proceedings had.

PAUL A. EWERT,
HENRY LEWIS,
Solicitors for Complainant.

The undersigned, attorney for the defendants and appellees acknowledges the receipt of a copy of the foregoing Pracipe this 26th day of February, 1919, and joins in the request of the said complainant that the transcript of record in the said case be composed of papers as in this pracipe set forth and no others, and waives the issuance and services of citation in said case.

A. C. WALLACE,
Attorney for Defendants

Endorsed: Filed in the District Court on February 26, 1919.

(Clerk's Certificate to Transcript.)

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of Mike Blanset vs. Oscar Cardin et al., Equity No. 2536, as was ordered by pracipe of Counsel herein to be prepared and authenticated as the same appears from the records in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Muskogee this 7th day of March, A. D. 1919.

[Seal U. S. Dist. Court, East. Dist. of Okla.]

R. P. HARRISON,
Clerk.

By H. E. BOUDINOT,
Deputy.

Filed Mar. 11, 1919. E. E. Koch, Clerk.

17 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(*Appearance of Counsel for Appellant.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5390.

MIKE BLANSET, Appellant,

vs.

OSCAR CARDIN, as Guardian of Jesse Daylight, a Minor, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

PAUL A. EWERT,
405 *Frisco Bldg., Joplin, Mo.*
HENRY C. LEWIS,
Bethesda, Maryland.

Endorsed: Filed in U. S. Circuit Court of Appeals, Mar. 11, 1919.

(*Appearance of Counsel for Appellee.*)

The Clerk will enter my appearance as Counsel for the Appellees.

A. C. WALLACE,
403 *Miami Trust & Savings*
Bank Bldg., Miami, Okla.

Endorsed: Filed in U. S. Circuit Court of Appeals, Apr. 9, 1919.

18 (*Order of Submission.*)

May Term, 1919.

Monday, June 9, 1919.

This cause having been called for hearing in its regular order, was submitted by appellant upon the brief filed in his behalf and argued by Mr. A. C. Wallace for Appellees.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

19 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1919.

No. 5390.

MIKE BLANSET, Appellant,

vs.

OSCAR CARDIN, as Guardian, etc., et al., Appellees.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Mr. Paul A. Ewert and Mr. Henry C. Lewis, filed a brief for appellant.

Mr. A. C. Wallace, for appellees.

Before Sanborn and Stone, Circuit Judges, and Munger, District Judge.

MUNGER, *District Judge*, delivered the opinion of the Court:

This record presents an appeal from a decree of the district court sustaining a motion to dismiss the plaintiff's bill because the bill failed to state a cause of action. The suit was brought by plaintiff, as the surviving husband of Fannie Crawfish Blanset, against her three children, two of whom were her issue by a former marriage and one the issue of the marriage between her and the plaintiff.

Plaintiff and Fannie Crawfish were married Aug. 3, 1906, and she died in Oklahoma on February 22, 1916. It is claimed that she was a member of the Quapaw tribe of Indians and at the time of her death was the owner of lands, some of which had been allotted to her under the provisions of the Act of Congress approved March 2, 1895 (28 Stat. 907) and some of which she held as the heir of her mother, a Quapaw allottee.

It is alleged that Fannie Crawfish Blanset, shortly before her death executed a will whereby she gave and bequeathed five dollars to her husband, the plaintiff, and devised all of the lands to her three children and that this will was approved by the Commissioner

20 of Indian Affairs and by the Secretary of the Interior. The plaintiff avers that no written marriage contract had been entered into between himself and Fannie Crawfish Blanset and that he is the owner of an undivided one-third of the lands of which she died seized, by virtue of the Statutes of Oklahoma, and prays that as to him the will may be cancelled and that his title to one-third share of the lands may be quieted. It is conceded that Mrs. Blanset,

at the time of her death, held her lands under patents containing restrictions on alienation and that the restrictive period had not expired. The questions presented upon these facts depend on the proper application and construction of certain statutes of the United States and of the state of Oklahoma.

An Act of Congress approved February 14, 1913 (37 Stat. 678) contains this provision:

"Sec. 2. That any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is hereby authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: Provided further, That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: Provided also, That sections one and two of this Act shall not apply to the Five Civilized Tribes or the Osage Indians."

The Secretary of the Interior has adopted regulations under this Act, which provide that the Indian superintendent of the district of the property to be conveyed shall assist the Indian in the drawing of his will so it shall express the wishes of the maker but without influencing him in the disposition he desires to make. The superintendent is directed to report as to the mental competency of the Indian; the circumstances attending the execution of the will; the influences which induced its execution; the names of those entitled to share in the estate under the state laws of descent; and where the distribution proposed by the will has cut off natural heirs and disposed of the estate to persons who would not otherwise inherit, the superintendent is directed to obtain from the testator, if liv-

ing, an affidavit setting forth the reasons for so disinheriting such natural heirs. In case the testator is dead he is to endeavor to learn from reliable sources the reasons for making such disposition. The competency of legatees or devisees to manage their own affairs is also to be investigated. In cases where a will has been made and the testator has died before submitting the will for the consideration of the Department of the Interior, a hearing is directed to be held to determine his legal heirs and where the distribution to be made under the will differs from that which would otherwise have been made under the state law of descent, if the testator had died intestate, the legal heirs are to be given notice and opportunity to object to its approval.

It is appellant's contention that, notwithstanding this Act of Congress and the regulations made thereunder by the Secretary of the Interior, a married Quapaw Indian may not make a will in Oklahoma, whereby more than two-thirds of the allotted lands held under a patent from the United States, containing restrictions on alienation, are devised to persons other than the spouse of the testator. He claims that in such a case Section 8341 of the Revised Statutes of Oklahoma (1910) applies, which reads as follows:

22 "Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will: Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband: Provided, further, that no person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath same by will."

Appellant claims that the Act of Congress heretofore quoted assumes that this section of the Oklahoma laws of descent and distribution shall continue in force as to wills of Indians authorized to be made by the Act of Congress, because it did not expressly provide how such lands should be devised and because it recognized the state laws of descent as applicable in case the Secretary disapproved a will after the death of the testator. We cannot agree with this contention. Before the enactment by Congress this testatrix could not have made a will conveying this land because of the prohibition in the last proviso of this section 8341 of the Oklahoma laws. The grant of the right to dispose of this property by will is clear and comprehensive, it contains no limitation as to portions of property to be devised nor as to the devisees to be selected, nor other restraint upon the exercise of the power, except that the disposal must be in accord with the regulations to be prescribed by the Secretary of the Interior and that the will must be approved by him.

The fact that Congress provided that the state law of descent should control in case a will was disapproved after the testator's death indicates an intent that it should not otherwise control. The general policy of Congress has been to maintain control over the

Indians and the disposition of their allotments, according to its ideas of what is beneficial for them, rather than to subject them to state laws. Congress was well advised that unworthy and designing persons sometimes contract marriages with Indians with a view to obtaining the benefit of the property which the United States has granted to the Indians and that the right of a testator or testatrix to select devisees, and the right of the Interior department to disallow any will, would often afford needed protection to dependent
23 and natural heirs against the waste of the estate as the result of an unfortunate marriage and enforced inheritance by state laws. Where the meaning of a statute is doubtful great weight is given to the construction placed upon it by the department charged with its execution. (Swigert v. Baker, 229 U. S. 187; *Lambe* v. Prichard, 223 U. S. 200; United States v. Hermanos, 209 U. S. 337) and regulations of a department, authorized by an Act of Congress in the execution of an act and not inconsistent with it have the force of law. In re Kelbel, 165 U. S. 526; United States v. Foster, 233 U. S. 545; United States v. Small, 236 U. S. 405; McKinley v. United States, — U. S. —, 39 Sup. Ct. Rep. 221.

The regulations which have been adopted by the Secretary of the Interior in the execution of this statute require the local Indian superintendent to submit such Indian wills to the department, but to report the names of those entitled to inherit by the state law of descent and where the distribution proposed by the will has cut off natural heirs and disposed of all the estate to persons who would not otherwise inherit, there is to be obtained from the testator if living, or from other reliable sources, if he is dead, the reasons for so disinheriting natural heirs. No provision is made for the probate of such wills in the state courts but they are to be approved or disapproved by the Secretary of the Interior and filed for record in that department. Legal heirs are to be given notice and a hearing, before a will is approved, "where the distribution made in the will differs from that which would otherwise be made under the state law." The construction thus placed upon the acts by the department shows that the state law of descent was not regarded as controlling. This Act of Congress is not limited to Indians in Oklahoma, but confers a right upon all Indians in the United States of the class named to dispose of such property by will. It was intended to lessen the restrictions on alienation that had theretofore prevailed. It is much more reasonable to suppose that Congress was conferring a uniform right upon such Indians than that it was making a grant subject to the varied restrictions and prohibitions on alienation by will that might exist in the several states.

It is conceded that Congress has the right to pass legislation in the interest of the Indians as a dependent people and that it may control the disposition of the allotments during the period of restric-
24 tion of alienation. Tiger v. Western Investment Co., 221 U. S. 286; Heckman v. United States, 224 U. S. 413.

The conclusion is, that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this Act of Congress free from restrictions on the part

of the state as to the portions to be conveyed or as to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior. We understand this conclusion is in accord with the views of the Supreme Court of Oklahoma. See Brock v. Keifer, 157 Pac. 88. The decree will be affirmed.

Filed November 5, 1919.

25 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1919. Wednesday, November 5, 1919.

No. 5390.

MIKE BLANSET, Appellant,

vs.

OSCAR CARDIN, as Guardian of Jesse Daylight, a Minor; L. M. Blanton, as Guardian of Clayton C. Daylight, a Minor; and Oscar Cardin, as Guardian ad Litem for Emma Louise Blanset, a Minor.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Oscar Cardin, as Guardian of Jesse Daylight, a Minor, L. M. Blanton, as Guardian of Clayton C. Daylight, a Minor, and Oscar Cardin, as Guardian ad litem for Emma Louise Blanset, a Minor, have and recover against Mike Blanset the sum of twenty dollars for their costs herein and have execution therefor.

November 5, 1919.

(*Petition for and Order Allowing Appeal to Supreme Court U. S.*)

To the Honorable the Judges of the Circuit Court of Appeals for the Eighth Circuit:

26 The above named appellant, feeling himself aggrieved by the order and decree made and entered in this cause on the 5th day of November, A. D. 1919, does hereby appeal from said decree and order to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that his appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree and order was based, duly au-

thenticated, may be sent to the Supreme Court of the United States, at Washington, District of Columbia.

And your petitioner further prays that the proper order touching the security required of him to perfect his appeal be made.

PAUL A. EWERT,
HENRY C. LEWIS,
Solicitors for Appellant.

The above petition is hereby granted and the Appeal Bond thereunto submitted, hereby approved, this 29th day of January, 1920.

WALTER H. SANBORN,
Senior United States Circuit Judge.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 29, 1920.

(Assignment of Errors on Appeal to Supreme Court U. S.)

Now comes the appellant, Mike Blanset, by his solicitors, Paul A. Ewert and Henry C. Lewis, and says that the decree entered in the above entitled cause on the 5th day of November, 1919, is erroneous and unjust to the appellant:

I. Because the Court erred in refusing to hold that appellant is
27 entitled at law to an undivided one-third interest in and to the estate of his deceased wife, Fannie Crawfish Blanset, by virtue of the first proviso to Section 8341, Compiled Laws of Oklahoma, as adopted by Congress.

II. Because the Court erred in refusing to hold that the substantive law of wills of the State of Oklahoma applies to Quapaw allotments so far as not in conflict with any express Federal provision.

III. Because the Court erred in refusing to hold that the power to make a will impliedly saves the marital portion which is inherited by a spouse in case of intestacy.

IV. Because the Court erred in giving any weight to the decision of the Department of the Interior in this case.

V. Because the Court erred in not holding that the Department of the Interior has no power to ascertain the heirs to restricted Indian allotments in the Quapaw Nation.

VI. Because the Court erred in affirming the decree of the trial Court dismissing the Bill of Complaint.

Wherefore: Appellant prays that the order and decree of the Ci
cuit Court of Appeals be reversed and that the District Court be i
structed to enter an order overruling and denying defendants' mo
tion to dismiss the bill.

PAUL A. EWERT,
HENRY C. LEWIS,
Solicitors for Complainant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 2
1920.

(*Bond on Appeal to Supreme Court U. S.*)

Know all Men by these Presents:

That we, Paul A. Ewert and Amos Gipson are held and firml
bound unto Oscar Cardin as Guardian, et al., in the full an
28 just sum of Five Hundred Dollars, to be paid to the sai
Oscar Cardin, as Guardian, et al., heirs, executors, adminis
trators, successors or assigns, to which payment well and truly to b
made, we bind ourselves, our heirs, executors and administrators
successors or assigns, jointly and severally by these presents. Seale
with our seals, and dated this 20 day of January, in the year of ou
Lord One Thousand Nine Hundred and Twenty.

Whereas, lately at the September term of the United States Ci
cuit Court of Appeals for the Eighth Circuit, in a suit depending i
said Court between Mike Blanset, a minor, L. M. Blanton, as Guard
ian of Clayton C. Daylight, and Oscar Cardin, as Guardian o
Emma Louise Blanset, a minor, appellees, a decree was rendere
against the said appellant and the said appellant has obtained an ap
peal of the said Court to reverse the decree in the aforesaid suit, an
a citation directed to the said appellees, citing and admonishing them
to be and appear in the Supreme Court of the United States at th
City of Washington, District of Columbia, thirty days from an
after the date of said citation.

Now, the condition of the above obligation is such, that if th
said appellant shall prosecute said appeal to effect, and answer al
costs if appellant fail to make good his plea, then the above obliga
tion to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

PAUL A. EWERT. [SEAL.]
AMOS GIPSON. [SEAL.]

Approved by:
WALTER H. SANBORN,
Senior United States Circuit Judge.

29 STATE OF MISSOURI,
County of Jasper, ss:

Paul A. Ewert and Amos Gipson, first being duly sworn, each
upon his oath says that the signature attached to the within bond
is his own signature; that he is worth the sum of Twenty-five Thou
sand Dollars over and above all liabilities; that he is a free holder

and a citizen of the State of Missouri, residing in the City of Joplin, in the County of Jasper, in the State of Missouri; that he attached his signature to the within bond freely and voluntarily.

PAUL A. EWERT.
AMOS GIPSON.

Subscribed and sworn to before me, a notary public within and for Jasper County, State of Missouri, this 26th day of January, 1920.

My commission expires Nov. 5, 1922.
[SEAL.]
TILLIE M. ADE.
Notary Public, Jasper County, Missouri.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 29, 1920.

(Waiver of Citation on Appeal to Supreme Court U. S.)

Come now Oscar Cardin, as Guardian of Jesse Daylight, a minor, L. M. Blanton, as Guardian of Clayton C. Daylight, and Oscar Cardin as Guardian of Emma Louise Blanset, a minor, Appellees in said above named case, by A. C. Wallace, their attorney, and acknowledge receipt of a copy of the foregoing praecipe for transcript of the record in the above entitled cause, and join with the request of appellant that the transcript of the record in said case be composed of the papers as in said praecipe set forth, and hereby waive the issuance and service of citation on appeal in said cause.

30 Dated this 20th day of January, A. D. 1920.

PAUL A. EWERT,
Attorney for Appellant.
A. C. WALLACE,
Attorney for Appellee-.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 29, 1920.

(Praecipe for Transcript on Appeal to Supreme Court U. S.)

To the Honorable E. E. Koch, Clerk of said Court:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to the petition for appeal granted and allowed in this case and to include in such transcript the entire record as the same appears in your Court.

PAUL A. EWERT,
HENRY C. LEWIS,
Solicitors for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 29, 1920.

31 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements, omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Mike Blanset was Appellant and Oscar Cardin, as Guardian of Jesse Daylight, a Minor, et al., were Appellees, No. 5390, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of February, A. D. 1920.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 27,470. U. S. Circuit Court Appeals, 8th Circuit. Term No. 715. Mike Blanset, appellant, vs. Oscar Cardin, as guardian of Jesse Daylight, a minor, et al. Filed February 7th, 1920. File No. 27,470.

Office Supreme Court, U. S.
FILED
FEB 8 1921
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 244

MIKE BLANSET, *Appellant,*

vs.

OSCAR CARDIN, *as guardian, etc., et al., Appellees.*

On Appeal from the United States Circuit Court of Appeals for the Eighth Circuit

BRIEF FOR APPELLANT

HENRY C. LEWIS,
PAUL A. EWERT,
Solicitors for Appellant.

W. F. ROBERTS CO. WASHINGTON D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 244

MIKE BLANSET, *Appellant,*

vs.

OSCAR CARDIN, *as guardian, etc., et al., Appellees.*

On Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR APPELLANT.

STATEMENT.

Appellant is the widower of Fannie Crawfish Blanset, a Quapaw Indian allottee. Her estate consists solely of her own allotment and her inherited interest in that of her mother, also a Quapaw. The Quapaws received the legal title at allotment, subject to restraint on alienation for 25 years. Fannie Crawfish Blanset died February 22, 1916, leaving a will (R., 9) by which she bequeathed her husband five dollars in cash and no more and no part of her interest in the said allotments, devising her entire interest therein to her children and a grandchild.

The husband, appellant here, filed a bill in equity in the United States District Court for the Eastern District of

Oklahoma, in which district the land is located, in which he seeks to set aside and cancel the will in so far as it attempts to deprive him of an undivided one-third interest in the entire estate, to remove the will as a cloud upon and to quiet his title to said interest, basing his complaint upon the adoption by congress of the first proviso to Section 8341, Revised Laws of Oklahoma, 1910, which section in full is as follows:

> "Every estate and interest in real or personal property to which heirs, husband, widow or next of kin might succeed, may be disposed of by will; Provided: That if no marriage contract in writing has been entered to between the parties, *no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman, while married, bequeath more than two-thirds of her property away from her husband.* Provided further, that no person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath same by will."

The adoptive act is fundamentally that of May 2, 1890 (26 Stats., 94, 95), which put in force in Indian Territory many of the provisions of the law of Arkansas:

> "The following provisions of Mansfield's Digest of the laws of Arkansas are hereby put in force in Indian Territory:
> * * *
> "Descents and Distributions, chapter 49;" * * *.

And by the Act of April 28, 1904 (33 Stats., pt. 1, 573, sec. 2), it is provided:

> The laws of Arkansas heretofore put in force in Indian Territory are hereby continued and extended in operation so as to embrace all persons and estates in said Territory, whether Indian, freedmen or otherwise.

At the time these acts were passed the testamentary power had not been given restricted allottees of any tribe, but the property descended, as to all tribes, wherever located, according to the local law.

When Oklahoma was admitted as a state congress intended that the Arkansas law of descent and distribution should not thereafter apply to restricted Indian allotments, but that the Oklahoma state code should govern; *Jefferson vs. Fink*, 247 U. S., 288.

Appellant contends that congress adopted the state law of descent and distribution without exception as to restricted allotments, and that in subsequently granting the power to devise such allotments it did not except such shares as are made inviolable by laws of the various states, like that at bar, nor has it done so in any statute; that in fact, in granting the power to devise, congress not only readopted the local law of descent and distribution, but adopted the local law governing "wills and testaments." Appellees contend that the power to devise is absolute and gives the allottee the right to exclude the spouse from the descents made inviolable by the state law.

Appellant also contends that the death of the allottees removed restrictions upon alienation, which of itself subjects the property to every provision of state law, regardless of adoption.

The will at bar was made and approved under the provisions of the Act of February 14, 1913 (37 Stats., 678), which is as follows:

> "That any person of the age of 21 years having any right, title or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States, shall have the right prior to the expiration of the trust or restrictive

period, and before the issuance of a fee simple patent or the removal of restrictions, *to dispose of such property by will*, in accordance with regulations to be prescribed by the Secretary of the Interior; Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior; Provided, further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in cases where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will, the Secretary of the Interior is hereby authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator *shall thereupon descend or be distributed in accordance with the laws of the state wherein the property is located.* * * * Provided, also, that Sections 1 and 2 of this Act shall not apply to the Five Civilized Tribes or the Osage Indians."

The foregoing act amends section 2 of the act of June 25, 1910 (36 Stats., 856), which act is as follows:

Section 1. "That when an Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration *of the trust period* and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent."

Section 2. "That any Indian of the age of 21 years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period and before the issue of a fee simple patent, to dispose of such allotments by will, in accordance with rules and regulations to be prescribed by the Secretary of the Interior;

Provided, however, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Commissioner of Indian Affairs and the Secretary of the Interior; Provided, further, That Sections 1 and 2 of this Act shall not apply to the State of Oklahoma."

The bill also alleges that the Department of the Interior found plaintiff to be the husband of the allottee but denied him the benefit of said share (see appendix hereto for department's decision). This allegation was made as a basis for judicial correction of the error of law in denying the share. Since filing the bill, however, it has been determined by the court below, in another case, that the department's power to ascertain heirs does not extend to allotments the legal title to which passes to the allottee at the time of allotment, as in the case at bar; in other words, that it extends only to "trust" allotments, that is, allotments the legal title to which is held in trust by the Government during the period of inalienability; U. S. vs. Bowling et. al., 261 Fed., 657. In the case at bar the court below, anterior to its decision in the Bowling case, decided the merits but did not touch the question of departmental jurisdiction, nevertheless giving weight to the department's finding as a departmental construction. Appellant contends that as the department had no jurisdiction its decision should go unnoticed; and that in any event it is erroneous.

On the merits the trial court, Judge Youmans, sustained a motion to dismiss the bill for want of equity, but rendered no opinion. The Court of Appeals, by District Judge Munger, of Nebraska, affirmed the District Court (R. 16). It may not be inappropriate to say that material statutes and this court's decision in Jefferson vs. Fink, which case we believe to be highly material here, if not controlling, were not cited to or considered by either the department or the courts below.

ASSIGNMENT OF ERRORS

I. The court erred in refusing to hold that appellant is heir at law to an undivided one-third interest in and to the estate of his deceased wife, Fannie Crawfish Blanset, by virtue of the adoption by congress of the first proviso to Section 8341, Compiled Laws of Oklahoma.

II. The court erred in refusing to hold that the substantive laws of wills of the State of Oklahoma applies to Quapaw allotments so far as not in conflict with any express federal provision.

III. The court erred in refusing to hold that the power to make a will impliedly saves the marital portion which is inherited by a spouse in case of intestacy.

IV. The court erred in failing to decide that the death of an allottee subjects the allotment to every provision of local descent and distribution.

V. The court erred in giving any weight to the decision of the Department of the Interior in this case.

VI. The court erred in not holding that the Department of the Interior has no power to ascertain the heirs to restricted Indian allotments in the Quapaw Nation.

VII. The court erred in affirming the decree of the trial court dismissing the bill of complaint.

ARGUMENT

Three questions are presented: (a) Whether the inviolable shares provided by the laws of the various states apply to restricted allotments. (b) Whether the death of the allottees caused such shares so to apply. (c) Whether the department had power to determine the heirs to the allotment at bar, simply as bearing on the question of weight to be given its decision.

GENERAL OBSERVATIONS

I

So far as the grant of testamentary power to restricted allottees is concerned there are but three acts of congress: The Five Civilized Tribes Act of April 26, 1906 (34 Stats., 145, as amended May 27, 1908, 35 Stats., 312); the Osage Act of April 18, 1912, Sec. 8 (37 Stats., pt. 1, p. 88), the allottees of all of which tribes hold the legal title with restraint; and the Act of June 25, 1910, of which the Act of 1913, on which rests the case at bar, is an amendment. This Act of 1910 gave the power only to those holding "trust" allotments. Other than the Five Tribes and the Osage, the legal title is given to allottees, in the first instance, to but a few small, scattered tribes, of which the Quapaw is one; all others hold trust allotments. As these few tribes were not given the power, either in the Five Tribes Act, the Osage Act, or that of 1910, the latter was broadened by the Act of 1913 to include "trust or other patent containing restrictions on alienation."

II

As long as restrictions have not been removed the allotment is subject to the plenary power and control of congress; Tiger vs. Western Investment Co., 221 U. S., 286; Walker vs. Brown, 43 Oklahoma, 144. When restrictions are removed the allotment automatically becomes subject to state law; Dickson vs. Luck Land Co., 242 U. S., 371; United States vs. Waller, 243 U. S., 452, 463; Brock vs. Keifer, 157 Pac., 89; Walker vs. Brown, 43 Okla., 144.

III

The state law of descent and distribution applies to intestate allottees, Jefferson vs. Fink, 247 U. S., 288. The In-

terior Department, in administering intestate allotments, applies every marital allowance provided by the laws of the various states, including dower, curtesy and homestead rights. So do the courts; Beam vs. U. S., 162 Fed., 260.

IV

Dower and curtesy were abolished by the Oklahoma Code.

V

Had appellant's wife died intestate he would have received, as heir at law, under Section 8418, Oklahoma Code, 1910, one-third of her estate (there is more than one child). Had there been only one child the husband would have received one-half; had there been no children he would have received the whole.

VI

Osage and Five Tribes wills are probated and the heirs are determined in the local probate courts, but Osage wills must receive the same approval by the department as those under the Act of 1913. The department retains possession of all wills made under the Act of 1913 until restrictions are removed, when they are filed in the local probate courts.

The reason why the department ascertains heirs and retains temporary possession of wills of allottees under the Act of 1913 is this: That act is fundamentally addressed to trust allotments. As fast as such allotments reach the end of the trust period, the department must convey the legal title to the heirs and devisees of the allottee, so the department was given power to ascertain heirs. And since no liens can be had upon restricted property, and there is therefore no need for immediately filing wills in the local courts, the department retains possession that it may readily know to whom to pay income and issue the legal title.

Other than the Five Tribes and Osage, the department has assumed to ascertain heirs to "straight" as well as "trust" allotments; contra, Bowling case, supra.

ALLOTMENT AND PATENT IN THE CASE AT BAR.

The Quapaws were allotted under the Act of March 2, 1895 (28 Stats., 907), which is as follows:

> "That the allotments of land made to the Quapaw Indians in the Indian Territory, in pursuance of an Act of the Quapaw National Council, approved March 23, 1893, be and the same are hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior; Provided, however, That any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same, as provided for in said Act of the Quapaw National Council subject to revision, correction and approval by the Secretary of the Interior. And the Secretary of the Interior is hereby authorized to issue patents to the said allottees in accordance therewith; Provided, That said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents; And provided further, That the surplus lands on said Reservation, if any, may be allotted, from time to time, by the said tribe to its members, under the above-entitled Act."

Pursuant to the adoptive acts and the Quapaw Allotment Act, the granting clause of the patent to Fannie Crawfish is as follows:

> "Now, know ye, That the United States of America, in consideration of the premises, and in conformity with the provisions in said Act of Congress approved March 2, 1895, the order and schedule of allotments aforesaid, has given and granted, and by these pres-

ents does give and grant, unto the said Fannie Crawfish, AND TO HER HEIRS, the said tract above described, but with the stipulation and limitation contained in the aforesaid Act, that the land embraced in this patent shall be inalienable for the period of twenty-five years from and after the date hereof; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said Fannie Crawfish AND HER HEIRS FOREVER; Provided, as aforesaid, That the said tract shall be inalienable for the said period of twenty-five years."

Dated September 26, 1896. (Patent to inherited land is the same in form.)

POLICY OF CONGRESS AS TO INDIANS AND THEIR ALLOTMENTS. STATE LAW OF DEVOLUTION AND TRANSFER INVARIABLY ADOPTED.

The evolution of Indians and their property from tribal status to the plane of the white man is well known to this court. From communal holdings and tribal governments congress has brought them to a position of individual landowners and of citizenship with the object of assimilating them to the body politic. Allotments in severalty were made with the provision that they be restrained from alienation for a period. These periods have now largely expired; and at all times there has been the power of alienation in certain contingencies, subject to approval by the Secretary of the Interior.

There are three ordinary methods of disposition of property: by sale, devise and descent at law. All three have been given to restricted allottees, except, of course, as to such restrictions on sale as have not been removed. In granting these powers congress invariably provided that it be done in accordance with the law of the state in which the

allotment is located, either expressly, or by necessary implication resulting from the failure of congress itself to provide a special code of governing law. Conveyances are made under that law, by implication, and, as there is no limitation as to the manner in which estates may be granted, with all the legal consequences which arise under that law. The allotments descend at law under the state code, by express adoption by congress as to a majority of tribes and by implication as to the others.

The power to devise is granted in but three statutes which embrace all allotted Indians in the country: The Osage act, which expressly adopts the state law of "wills;" the Five Tribes act and the act at bar, both of which latter do so by implication. All wills except those of the Five Tribes (subject to a special provision as to full-bloods in those tribes) must be approved by the Secretary of the Interior, but that and others are protective measures and have no bearing on substantive matters; as to all rules of devolution and transfer the state law results.

In truth, congress has so far adopted the state substantive law generally that the only changes which take place upon removal of restrictions, and consequent subjection to state sovereignty, are taxability and power in the allottee to convey and lien. In all other respects the federal legislation adopts the state law or is of a protective or administrative character.

This policy was of course necessary to assimilate the Indian to the state. But it was more than that: It was an economic necessity. For the chaos which would result from varying codes of devolution and transfer in the same state at the same time is at once manifest. Otherwise the status of a title in every state in which there are or were Indians would require the ascertainment of whether the land had been owned by an Indian, of what tribe, and

whether, for that tribe or for Indians generally in that state, congress had provided a special code of descent and distribution or whether it had carved any exceptions from the local code. And the only instance of judicial countenance of any such theory is in the case at bar, which declares an exception in a descent in favor of the spouse which exists in some form in every state, perhaps in every country.

This economic difficulty is not one of degree; it is as much in the fact of exception as in the number. And while such exceptions, if made, might be generally known contemporaneously with their making, congress not only recognized the difficulties which would then prevail, but forestalled the greater chaos which would result in the distant future when the exceptions could be known only by research of almost impossible proportions. We think the court should require that it be shown that congress intended any other situation by language too plain to admit of doubt.

Appellant's case is therefore based upon the letter of the federal acts adopting the state law and upon the necessity for *uniformity of devolution of titles between whites and Indians in the same state* and the policy of congress in that behalf.

THIS COURT HAS DECLARED THE FOREGOING POLICY.

Jefferson vs. Fink, 247 U. S., 288, decided June 30, 1918, involves the acts of congress heretofore referred to by which the laws of "descent and distribution" of Arkansas were put in force in Indian Territory and made applicable to "both whites and Indians." The Creek Allotment Act of 1902 was passed while these laws were in effect; and it also provided that the descent should be according to the Arkansas law, and the allotment there at

bar was made during the same period. Upon the advent of statehood in 1907 Oklahoma enacted her code, which is the present one, whose laws of descent and distribution differ from those of the Arkansas law which had theretofore been in effect in Indian Teritory. The allottee died after statehood and by one party it was contended that the Arkansas law applied because of the provision in the allotment act and because the allotment, when made, drew to it the then prevailing law of descent, but this court held that it was the invariable policy of congress to have restricted allotments descend according to the law of the state in which located, and that while congress had not expressly put in force the new Oklahoma code as to allottees, the acts prior to statehood were purely provisional and that the local code prevailed. Said the court:

> A notable illustration of what came to be the policy of congress on the subject is found in the general allotment act of February 8, 1887, the 5th section of which says that for a designated period the United States will hold the land in trust for the allottee "or in case of his decease, of his heirs according to the laws of the state or territory where such land is located;" and at the expiration of the period will convey the same in fee to the allottee "or his heirs aforesaid;" * * * True, that act has no direct application to the lands of the Five Tribes, of which the Creek tribe is one, but it does throw much light on what was intended by subsequent legislation relating to the descent of these lands when allotted. (P. 290.) * * * In other words, that act (Creek allotment act of 1902) was made to conform to the general policy of congress in respect of the descent of Indian allotments. (P. 294.) * * * We have seen that congress was accustomed to subject allotted Indian lands to the local laws of descent. (P. 294.)

Against this we have the opinion of the Court of Appeals

The descent provisions of those acts applied to all tribes in Indian Territory, of which the Quapaw is one, and to both restricted and unrestricted allotments, and were succeeded at statehood by the Oklahoma code. But appellant claims no extraordinary result or condition of the law in Oklahoma by force of them; for congress, in scattered statutes, has provided no less for all tribes in all states: Jefferson vs. Fink. The generality of the acts of 1890 and 1904 is due to the then territorial omnipotence of congress, and their application here is due to the failure of congress to provide expressly for descent of Quapaw allotments, as it so failed in other instances; e. g., Winnebagos of Minnesota, Act February 21, 1863, Sec. 4, 12 Stats., 658.

In time of ~~Up to~~ the act of 1904 there was no testamentary power in restricted allottees of any tribe; and while congress knew this, presumptively at least, and may be said to have legislated in the light of that fact, it is plain that it was enacting a permanent code of descent and therefore one which contemplated not only such changes as the state legislature might make at any time, but all future conditions into which the allottee might come with their attendant results under the state law, unless congress should declare to the contrary. So that when the testamentary power was given with no direction that the marital descents which were made invulnerable against the testamentary power by the various state provisions, of which congress also presumptively knew, were to be excepted, the Indian spouse as plainly took those descents by force of the antecedently adopted code as though congress had said it in the same breath with the grant of power to devise, for the Indian then came into a new condition whose legal results were ascertainable only under the state law.

There is another form of adoption wherein the reference is not to any particular statute or part of a

statute, but to the law generally which governs the subject. The reference in such case means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied (citing cases). The Supreme Court of Illinois says: "Where the adopting statute makes no reference to any particular act by its title or otherwise, but refers to the general law regulating the subject in hand, the reference will be regarded as including not only the law in force at the time of the adopting act, but also that in force when the action is taken or the proceeding resorted to."

Lewis's Sutherland, Vol. II, 2d ed., p. 789.

In Culver vs. People, 161 Ill., 89, 97, it is said:

> When the reference is not to a particular law the act becomes a rule of future conduct to be found when needed by reference to the law governing such cases at the time when the rule is invoked; Gaston vs. Lambkin, 115 Mo., 20, 33.

Wall vs. Pfanschmidt, 106 N. E., 788, which involves the question whether one who murders can take as heir of his victim, is applicable here:

> If in a statute there is neither ambiguity nor room for construction, the intention of the legislature must be held free from doubt. The question as to what the framers of the statute would have done had it been in their minds that a case like the one here under consideration would arise is not the point in dispute. The inquiry is as to what in fact they did enact, possibly without anticipating the existence of such facts.

The court cited U. S. vs. Wiltberger, 5 Wheat., 76, opinion by Chief Justice Marshall, and added: "Knowledge of the principles of statutory law must be imputed to the legislature." A fortiori this is all true where, as here, the

that the husband here did not take the descent provided by Section 8341, because:

> The general policy of congress has been to maintain control over the Indians and the disposition of their allotments according to the ideas of what is beneficial for them rather than to subject them to state laws. (Opinion, R., 18.)

Of course, there is perfect compatibility between maintaining control and an adoption of the state law. And in Beam vs. U. S., 162 Fed., 260, 263, in which it was held that curtesy applies to a restricted allotment, the Court of Appeals for the Ninth Circuit says:

> It (adoption of state law of descent and distribution) was the expression of the more recent policy of the Government, the purpose of which is to dissolve the tribal relation, establish the Indians in individual homes * * * and to make their tenure of real estate in all respects subject to the local law.

It is true that this court, in the Jefferson case, was not speaking in the light of the testamentary power—the estate there was intestate—but one descent is as much within the reason of the policy as another, and therefore within the policy itself unless congress expressly provides otherwise, and this it has not done. The grant of power to devise necessarily brought into play the descent at bar.

The only exception to this policy is apparent rather than real and is disclosed by the case of Washington vs. Miller, 235 U. S., 422, also a Creek case, but this court there held the provision not incompatible with the local law of descent; and as it grew out of special Creek legislation, of course it applies only to Creek allotments.

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REVIEW AND EFFECT OF THE ACTS OF CONGRESS WHICH ESTABLISH DESCENTS AND DISTRIBUTIONS AND OF THE THREE WHICH GIVE THE TESTAMENTARY POWER.

Those passed prior to the grant of power to devise contemplate all future changes in the state law and in the status of the allottee unless congress otherwise provides.

The general allotment act of February 8, 1887 (24 Stats., 388), is not directly applicable here because the Quapaws were not allotted under it, but, as is said in Jefferson vs. Fink, it is a striking illustration of the practice of congress and it is also cited here because of its geographical comprehensiveness. That act applies only to reservations the legal title to which had not passed from the Government and includes many small tribes in Oklahoma. It provides that the United States will hold the allotment in trust for 25 years:

> "for the benefit of the allottee, or in case of his decease, of his heirs according to the laws of the state or territory where such land is located." (Sec. 5.)
>
> "The law of descent and partition in force in the state or territory where such lands are situate shall apply." (Ibid.)

The act of May 2, 1890 (26 Stats., 94, 95), and that of April 28, 1904 (33 Stats., pt. 1, 573, sec. 2), have hereinbefore been quoted. In addition to adopting the Arkansas law of descent and distribution, those acts also adopt the same law of "Wills and Testaments, chapter 155." That provision did not authorize allottees to will their restricted property (Taylor vs. Parker, 235 U. S., 42), and no claim is here made that it anticipated the subsequent grant of that power.

statutes are adoptive and operate upon legislation wholly in the hands of a different body and where the adoptive statutes cannot possibly anticipate the cases which may arise under them.

So that these statutes operate upon future changes, both in the law and in the Indian, and instead of permitting them to do so the effect of the decision below is to declare an implied repeal of all such state provisions as the one at bar by the statute of wills, which, of course, is obnoxious if the two acts are reconcilable; U. S. vs. Greathouse, 166 U. S., 601. Those here are easily reconcilable, for the two elements are found in every system of law. But they are more than that: they are positively interlocking. The case may indeed stop here.

The statutes of wills simultaneously adopt the code of descent and grant the testamentary power.

But by acts subsequent to the foregoing congress did in the same breath give the power to devise and adopt the local code of descent and as no exceptions are made the result is mathematical. The Five Tribes Act of April 26, 1906 (34 Stats., 145), as amended by the act of May 27, 1908 (35 Stats., 312), is as follows:

Act of 1906:

> Sec. 5. If any such allottee shall die • • • the title to the land shall inure to and vest in his heirs; and in case any allottee shall die after restrictions have been removed his property shall descend to his heirs or lawful assigns.
>
> Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein. Provided: That no will of a full-blood Indian devising real estate shall be valid if such will disinherits the parent, wife, spouse or children of such

full-blood Indian unless acknowledged before and approved by a judge of the United States court for Indian Territory or a United States Commissioner ("or a judge of a county court of the state" added by the amendment of 1908).

Next, the Osage Act of June 28, 1906 (34 Stats., 539), which provides, Section 6 (p. 545):

> That the lands, moneys and mineral interests herein provided for of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma or of the state in which said reservation may be hereinafter incorporated.

An amendatory Act of April 18, 1912 (37 Stats., pt. 1, p. 88, sec. 8), provides:

> That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal or mixed * * * by will from which restrictions have not been removed, IN ACCORDANCE WITH THE LAWS OF THE STATE OF OKLAHOMA. Provided: That no such will shall be admitted to probate or have any validity *unless approved before or after the death of the testator by the Secretary of the Interior.*

And then the Act of June 25, 1910, and the amendment of February 14, 1913. The Act of 1910 (trust allotments only) provides that the Secretary shall "ascertain the legal heirs" (state law formerly adopted by general allotment act of 1887). The Act of 1913 provides that if the secretary approves a will and afterwards discovers that the will is fraudulent, he may revoke his approval within one year and disapprove and the property "shall descend or be distributed in accordance with the laws of the state

wherein such property is located." The court below says this provision indicates that the state law is to obtain only when the will is disapproved for fraud and not otherwise. What congress plainly meant was that such a disapproval within the time prescribed should finally destroy all efficacy of the will and it manifested this by saying that the property should descend at law. It was dealing with the fact that it should descend at law in that particular instance, not with instances in which it should not, nor with any exceptions to the state law.

The three statutes of wills and those which adopt the codes of descent are all in pari materia.

These three acts of wills are all a part of a general system of legislation granting the testamentary power to restricted allottees and are therefore in pari materia. Upon general principles they are to be regarded as one statute in explaining their meaning and import; Patterson vs. Winn, 11 Wheat., 336; Ryan vs. Carter, 93 U. S., 78, 84. This is particularly true here because congress has consistently adopted a policy of uniform devolution as to all allottees in the same state, so the acts must be read together, and the express command of the state law by the Osage act places the case beyond doubt.

No less is it true that the provisions adopting the state law of descent are in pari materia with the wills acts and that they are all a part of a comprehensive system regulating the disposition of restricted property at the death of the allottee.

The Five Tribes Act.

Section 5 of the Five Tribes Act of 1906 provides for the descent of the allotment both before and after removal of restrictions. The latter is what would necessarily result

by reason of the release of control by congress and the descent at bar would then admittedly apply, and as the same language is used as to descent before removal of restrictions, is it not beyond doubt that congress intended no distinction?

The requirement as to "disinheritance" in Section 23 of the Five Tribes Act is practically inoperative because the draughtsman had an unintelligible notion of the term: The devise of a penny would obviate a total disinheritance, and whether there is a partial disinheritance involves a calculation of values too nice to be practicable, since the same trifle would control. The term is popular and approximate rather than legal or mathematical, and the provision is meaningless and worthless.

Disinheritance, of course, means a *lawful* willing away from an heir at law of some or all of the share which he would take in case of intestacy and therefore involves no conflict with the descent at bar. Section 23 includes parents and children, which shows that it refers only to defeasible descents, which as to the spouse in Oklahoma would be the half or the whole, depending upon whether there was one child or none. Disinheritance, in its correct meaning, and the descent at bar are not only inherently reconcilable, but the acts of 1906 and 1908 readopt the state law of descent without excepting any of its provisions, which limits the disinheritance to such as is permitted by state law. The doctrine of Chestnut vs. Capey (post) requires a construction, if any were necessary, which would mean the same limitation, and this comports with the Osage act, which expressly commands the State law.

The purpose of the requirement as to full-bloods, although easily defeated, was to safeguard the less intelligent and weaker members of the tribe, their wives, husbands and children from fraud, not to fix the extent of the power

to devise, nor to modify the law of descent, which had been enacted, and re-enacted in that very act, as it then existed or might exist in the future.

The words "all interest therein" were used in section 23 because part of the allotment was by that very act released from restrictions and part restrained, but it was desired to permit both portions to be devised. As to this provision and that regarding disinheritance, it is worthy of note that under the Arkansas law, which was in effect when the act of 1906 was passed, dower and curtesy obtained (Mansfield's Digest), and it will not be said that either provision was intended to take away those or any other marital shares, all of which had theretofore been consistently allowed. Congress declared the state law without exception in the act of 1904, in that of 1906, by the Enabling Act in 1907, and by the act of 1908, hence it declared it before, concurrently with and after the power to devise, and we submit that a judicial decision of an exception would reach the domain of violence.

The Osage Act.

The Osage legislation expressly adopting the state law, of both wills and descent, is too plain to require argument.

THE FEDERAL STATUTES GRANTING THE TESTAMENTARY POWER ADOPT THE STATE LAW OF "WILLS."

In Chestnut vs. Capey, 146 Pac., 589, it appears that Capey was a full blood Choctaw. By none of several wills did he devise any portion of his allotment to Margaret Capey, who claimed to be his widow. The trial court sustained her claim and found there were no children. All of the wills failed, either because of failure to comply with section 23 of the Five Tribes act or because of revocation,

and she was declared the only heir at law. It was contended that the state law of wills did not apply as to revocation or at all. In affirming the judgment of the trial court the Supreme Court said:

> When Congress provided, as it did, by the act and the amendment thereto that "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein" congress was legislating for the Indians and thereby in effect said to this testator and all other Indians of lawful age and sound mind that thereafter, as to their lands, concerning which congress had a right to legislate, the same might be devised by will and in the manner of so doing the testator was to be governed by the statute of wills in force in the state at the time of making the will just as any other citizen of the state, with one exception, to wit: (court quotes proviso to section 23 that no will of a full blood shall be valid, etc. * * *)
>
> By implication, then, we gather that congress intended the state law to apply in all matters concerning not only the execution but the revocation of this will, except those matters wherein congress had *expressly* provided otherwise. In other words, congress intended that the state law should yield only so far as it interfered with the operation of the act of congress.

Then said the court:

> The acts (federal and state) must be construed together. * * * And so, as the court was right in holding that our statute on wills gave way to the act of congress only so far as that act required this will to be acknowledged before and approved by a judge and that the state statute was applicable to the revocation of this will when made, we will next determine whether the instrument was executed in accordance with that statute.

There must be a system of governing law upon which the court may rely when confronted with the substantive questions with which the practical lawyer is familiar, such as the rule against perpetuities, executory devises, lapsed legacies, contingent and vested remainders, validity of a trust or power, ademptions and advancements. And in such cases the department does in fact apply the state law.

Decision below means sharp difference in descent between Osage and all other Indians in Oklahoma, i. e., that Osage marital portions were saved while those of others were not.

But the conclusive feature of these federal statutes of wills is that the Osage act expressly commands that wills are to be made "in accordance with the laws of the state of Oklahoma." We assume that no one will deny that this plain and comprehensive provision drew to it the inhibition of the proviso at bar. So if we deny its application to the other two statutes of wills we are met with the astounding proposition that congress intended one rule of devolution for the Osage and another for all other Indians *in the same state;* thus we encounter one of the very reasons which moved congress to apply the local law. And the invidiousness of the distinction is enough to exclude it. See Supp. Brief, page one.

The court below erred in assuming that the Indians under the act of 1913 form a "class" as to which congress intended a separate code of descent.

The court below says:

> It was the intention of congress that this "class" (those under the act of 1913) should have the right to dispose of property by will free from restrictions on the part of the state law. (R., 19.)

This is not only contrary to the policy of congress, but the allottees under that act do not form any "class" of which any such distinction can be predicated. The reason for the three separate statutes of wills is fully explained herein in General Observation VI. As the act of 1913 embraces every tribe in the country except the Five Tribes and Osage, the asumption of "class" with respect to descents, or to any other element, except as stated in General Observation VI, is therefore erroneous.

DISCUSSING THE CASE OF BROCK vs. KEIFER, 157 Pac., 89.

This case is cited by the court below and is a pure phantom. It arose in the Five Tribes and was a petition for probate of a will which left nothing to the husband. He opposed the probate because of the descent at bar and the trial court admitted the will but held the husband entitled to one-third under the said descent. On appeal the court held that the question of the husband's title was not open on a petition for probate, which was merely to try the factum of the will, and refused to decide the former question. But it vouchsafed the suggestion that it does not apply, citing Walker vs. Brown, 43 Okla., 144. (a) The Walker case involved only the second proviso to 8341, which prohibits the devise of inalienable property, and it was *properly* held not to apply to restricted Indians because congress had given the right to will restricted allotments. The court, however, loosely referred to that proviso as "Section 8341" throughout the opinion, without distinguishing between it and the first, and when the proviso at bar came before the court in Brock vs. Keifer, it also was referred to as "Section 8341." The whole tenor of the court's suggestion plainly shows that it was made under the supposition that the opinion in Walker vs. Brown applied to the

entire section (most of which in truth has no application to Indians), for the court said:

> We deem it necessary to call attention to the fact that *section 8341* would have no field of operation in this case as it was held in Walker vs. Brown that said section does not apply to Indians of the Five Civilized Tribes. In said case, which involved the devise of the allotment of a half-blood Seminole Indian, Chief Justice Kane says: "* * * In the instant case, and others similar to it, congress has seen fit to permit the Indians to dispose of certain of their allotted lands by will, whilst it prohibits all other conveyances, alienations or incumbrances. It is obvious that if the state law were given the construction contended for it, it would have the effect of interfering with the policy of congress toward the Indians in the matter of the alienation of their allotted lands."

(b) The Walker case was a rightful denial of a *fundamental* application of the state laws to restricted allotments, even if the state law had not been contrary to the permission to devise given by congress. In the Brock case a *fundamental* application of the state law was again demanded, but the adoption of the proviso at bar as a part of the state law of descent and distribution was not even discussed, nor was the doctrine of Chestnut vs. Capey, which had theretofore been decided by a different judge; the case was not even mentioned. The Brock case was simply a mistaken, superficial and obiter notion of the scope of Walker vs. Brown.

Of course, the opinion does not bind the federal courts because the question at bar is purely federal, i. e., a construction of the federal adoptive acts, and because the opinion was of a question of which the court confessedly had no jurisdiction and was therefore moot.

INTENT AND PURPOSE OF THE FEDERAL STATUTES GIVING INDIANS THE TESTAMENTARY POWER.

Congress first adopted the state law of descent and distribution, under which the spouse was and is allowed—by the courts and the department—dower, curtesy and all manner of marital allowances. Then it provided for sale and conveyance. Finally it gave the power to devise, and its purpose in so doing was only to give that power, not to change its policy with regard to descent and distribution. Not only is there manifested no intent to destroy the existing uniformity in titles between the whites and Indians, but the statutes of wills were a positive step to put the latter upon the plane of the former. They were but another development in the political metamorphosis of the Indian.

Congress presumptively knew of the various state provisions. It knew that it had theretofore adopted the local law as a permanent rule of devolution, and the statutes of wills themselves readopt that law. And the department, at the time of the passage of the statutes of wills, was, as it is now, enforcing all manner of marital provisions as to intestates. Yet there was not the slightest attempt in all this legislation to make any distinction between defeasible and indefeasible provisions. The reason is plain, for congress was concerned only with two abstract ideas: To give power to devise and to have the allotment distributed according to local law, not with the details of the distribution in all its varying provisions as between the codes of all the states; indeed, it is probable the framers thought little or nothing about them, for it is at once manifest that they could not know the changes which might occur or the questions which might arise under existing law; Wall vs. Pfanschmidt, supra.

Having, in prior statutes and in the statutes of wills

themselves, adopted the local law with no exceptions, congress abstractly gave the power of devise. "To dispose of such property by will" is the grant in the act at bar. Congress could not have said less, and had it desired to change the existing policy of descent and distribution, even in part, it would have said more, particularly in the readoptive provisions of the wills acts. Congress was between two alternatives: To accept the state law or to create a code of its own. It knew, and the department knew, that a mixture is not only impracticable but disastrous. And its failure to attempt to carve any exceptions must survive, with the result that whatever descends under the state law despite the power to devise must so descend under the adoptive law.

The court below says that the act of 1913 contains no limitations or exceptions, which, of course, overlooks all questions of policy and adoption. But more than that: *If congress did not include in the statutes of wills all provisions like that at bar because it did not express them, then it so excepted every other provision of the state law of wills, and there is no law at all by which this vast wealth can be administered.* And since congress gave the power to convey allotments as abstractly as it did the power to devise, by the same token there would be no law governing such conveyances, with the result that the state law might be opposed with impunity, yet it will not be disputed that the state law of deeds does apply to sales by allottees and by their heirs. And that congress did not except from that law the usual requirement of joinder in the deed by the spouse to divest the indefeasible marital shares (Secs. 1143 and 1144, Oklahoma Code; Love et al. vs. Cavett, 26 Okla., 179, 186) is additional proof that it did not intend to exclude those shares from the statutes of descent and wills.

In truth, the department applies the state law of wills generally, yet it excluded that at bar, giving no reason for the distinction.

Opposing counsel will not deny that the department does apply the substantive law of the state in other respects in administering these wills. An apt illustration is a devise in violation of the state law against perpetuities. The federal statutes of wills do not restrain on their face such a devise, yet the department will admit that it would refuse, if it has not already done so, to administer such a devise if forbidden by the state law, which generally it is in some form. Upon what principle is one restraint and not another read into the federal statutes? Since the whole power to devise under the act of 1913 springs from the bare words "To dispose of such property by will," *an intense literalness is no more permissible to exclude the state restraint upon quantity than upon method,* or other limitations. Thus a gravely inconsistent position is taken, which may account for the entire absence of argument in the department's decision herein (appendix).

The regulations positively affirm the state law of descent and distribution, and their failure to promulgate any substantive law of wills must imply a lack of power to make it and that the state law was intended. If the present regime desires latitude in declaring descents because of moral, sentimental or racial (appellant is white) considerations, it must secure it at the hands of congress. Nor may it, upon such considerations, deny the state law in one instance and force a practical observance of the same provision in another by an abuse of its power of disapproval.

Statutes of wills absolute on their face have always been construed to save by implication the marital portion which would descend in case of intestacy.

The original statute of wills of England also gave the right "to dispose of estates by will;" 32 and 34, Hen. VIII. It contained no express saving of the share which would fall to the spouse in case of intestacy, yet it was construed impliedly to save those rights, and the same in America; numerous decisions in 14 Cyc., 62-B. The husband's share included curtesy and all personalty, and statutes of wills, both in England and America, have always been held to save that share by implication; numerous American cases, 14 Cyc., p. 69, par. 7, and p. 70, N-47 and 48; 40 Cyc., p. 1057, E. Where the common law portion has been supplanted by a statutory share, some such statutes as the proviso at bar has invariably been passed. The effect of such a statute is to "modify" the share which the spouse would take in case of intestacy, the two statutes being in pari materia and inseparable; Smoot vs. Heyser, 67 S. W., 21; Doyle vs. Doyle, 50 Ohio St., 330; Sears vs. Sears, 121 Mass., 267; Matter of Harris, 20 N. Y. Sup., 68.

As the effect of this rule of construction is fundamentally to save by implication the share which would have fallen to the husband in case of intestacy under section 8418, which in this case would be one-third, the same result is reached even if the court goes to the extreme and we think violent extent of ignoring the proviso at bar. Of course, any doubt should be resolved in favor of this rule of construction.

REASONS PECULIAR TO DESCENTS LIKE THAT AT BAR WHY CONGRESS COULD NOT HAVE INTENDED THEIR EXCLUSION.

(a) State law, without exception, admittedly applies to allotments after removal of restrictions: An allottee

may and often does own both restricted and unrestricted property, growing either out of the fact of his ownership of property which did not come from the government or the tribe or out of the policy of congress to remove restrictions at first from part of the allotment, leaving the restraint on the other, which is usually known as the "homestead." If an Indian invests his unrestricted estate in his restricted estate, which he often does, and the descent at bar does not apply to the latter, he thereby, through ignorance or fraud, frustrates the state law entirely and this through the medium of a law of congress. Conversely, if he invests the income from his restricted property, which is often very large, in his unrestricted estate, the federal law is circumvented.

(b) And a situation positively grotesque would arise from the fact that *after* restrictions are removed congress may reimpose them (Brader vs. James, 246 U. S., 88), for today the descent at bar would not apply, tomorrow it would, and the next day it would not.

Such results may not be imputed to congress.

IN ANY EVENT THE ALLOTMENTS AT BAR ARE SUBJECT TO EVERY PROVISION OF STATE LAW OF DESCENT AND DISTRIBUTION BECAUSE OF THE DEATH OF THE ALLOTTEES.

Sec. 9 of the Five Tribes act of May 27, 1908 (35 Stats., 312, 315), provides:

> "The death of any allottee of the Five Tribes shall operate to remove restrictions upon alienation."

Beyond all argument the allotment is thereby subjected to state sovereignty.

The act of May 27, 1902 (32 Stats., 245, 275), which applies to Quapaws, provides:

> That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienations has been or shall be issued * * * may sell and convey the lands inherited from such descendent * * * but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser.

A distinction between the two acts appears in that under the latter the approval of the secretary is necessary to a conveyance. But as to the latter act the Supreme Court of South Dakota, in Eagan vs. McDonald, 36 S. D., 92; 153 N. W., 915, while by implication saying that the secretary had jurisdiction to determine heirs until his approval of such a conveyance, said of the effect of the act:

> The effect of this provision was, in case of the death of the allottee, to remove the restraint upon alienation found in the patent here under consideration. In case of the death of the allottee his allotment may be sold by the heirs themselves, if adult, and by the guardians of the heirs who are minors. This is the plain import of the language used, and the government, acting through congress, had the same power to remove restrictions upon alienation as it had to place them there in the first instance.

By the acts of May 29, 1908 (35 Stats., 444) sec. 1, and June 25, 1910 (36 Stats., 855, 856) sec. 1, the secretary is directed to issue patents "in fee" to all *competent* heirs where an allottee dies before expiration of the trust period, and to retain restrictions as to non-competent heirs. Section 1 of the Act of June 25, 1910, is the very section which provides for the ascertainment of heirs; and section 2 of the same act provides for wills. And the act of May 8, 1906 (34 Stats., 182), shows the policy of congress, for it declares that when patents in fee are issued to trust allottees,

the allottee "shall have the benefit of and be subject to all laws, both civil and criminal, of the state."

The foregoing legislation, other than section 9 of the Five Tribes act, contemplates only intestate property. And while section 2 of the act of Feb. 14, 1913 (the wills act at bar), provides that the death of the testator and the approval of the will shall not terminate the trust or restrictive period, yet that very section provides that the secretary, *in his discretion*, may:

> "remove restrictions, or cause patent in fee to be issued (the latter applying to trust allotments) to the devisee or devisees."

Thus the only distinction between the effect of the death of an allottee of the Five Tribes and others is that the approval of the secretary is necessary to convey as to the latter, for, as has been said, the only changes which take place in the substantive law upon removal of restrictions is the right to convey and lien and the liability to taxation, as to the latter of which section 9 of the Five Tribes act had no effect because that section removes restrictions prior to the date named in the patent, which date is an inviolable covenant with any allottee that his allotment shall not in any event be taxable until then; Choate vs. Trapp, 224 U. S., 665.

But in any event congress intended no distinction in descent as between before and after death of the allottee, or as between before and after removal of restrictions, for the legislation above referred to renders any such distinction so complex and improbable as to put it beyond intent, as is shown by—

Additional reasons why congress did not intend to exclude descents and distributions like that at bar from allotments, even if restricted.

(a) If the death of allottees other than Five Tribes does not remove restrictions, the spouse of heirs of Five

Tribes allottees receives the inviolable marital share because the death subjects the allotment to state sovereignty, while that of heirs of other allottees does not unless declared competent.

(b) In the Five Tribes ~~(if not in all others)~~ the spouse of an ~~heir~~ allottee would receive the inviolable marital share, while that of the ~~*allottee*~~ other would be denied it, for the same reason.

(c) Under the acts of May 29, 1908, and June 25, 1910, supra, the spouse of a *competent* heir, by ~~receiving~~ a patent free from restrictions, or that of a devisee as to whom the secretary, in his discretion, removes restrictions or issues a final patent, with the resultant subjection to state sovereignty, would receive the inviolable marital portion, while the spouse of ~~other heirs~~ competent allottees would not.

(d) Under the Osage wills act of 1912 only adult "competents" may devise, so that the spouse of a non-competent would be protected by descent at law, while that of a competent would not because of the power to convey away from the spouse the entire estate.

These results are not only too invidious to be countenanced, but are obnoxious to the policy of uniformity and to provisions of law which are not open to construction.

THE ACTION BY THE DEPARTMENT.

As has been shown, the approval by the department has no bearing on the issue at bar, nor has it been argued otherwise. But the department assumed the right to determine the heirs of Quapaw allottees and refused to apply the descent at bar. The act of 1910 gives the department the power to ascertain heirs only to "trust" allotments. The patent at bar is a legal title with restraint upon alienation, and while the amendment of 1913 broadened the act of 1910 to include wills of such titles, it did not so broaden it as to the ascertainment of heirs by the department. The

court, in the Bowling case, held the power of the department limited to trust patents, which was affirmed on appeal, decision by Judge Munger, a month after the decision in the case at bar. The Court of Appeals in the case at bar did not consider this question at all, but gave weight to the department's heirship finding.

If the department had no jurisdiction to determine heirs, its finding was *coram non judice* and therefore of no weight here. In any event, it is only in case of ambiguity and doubt that it has any weight at all; Swift vs. United States, 105 U. S., 691; and where one of the parties invested money on the strength of the departmental decision; Studebaker vs. Perry, 184 U. S., 258.

Even if the department had power to determine heirships, there is ample authority for jurisdiction here; Johnson vs. Towsley, 13 Wall., 72; Gegiow vs. Uhl, 239 U. S., 3; Decatur vs. Paulding, 14 Pet. 497; Warren vs. Van Brunt, 19 Wall., 646; Shepley vs. Cowan, 91 U. S., 330; Moore vs. Robbins, 96 U. S., 530; N. P. R. R. vs. Colburn, 164 U. S., 383; Menotti vs. Dillon, 167 U. S., 703; Wisconsin vs. Forsythe, 159 U. S., 46. For cases involving Indian heirships and allotments, see Hallowell vs. Commons, 210 Fed., 793; Hy-Yu-Tse-Mil-Kin vs. Smith, 119 Fed., 114; Little Bill vs. Swanson, 117 Pac., 485; McKay vs. Kalyton, 204 U. S., 458; Ross vs. Day, 232 U. S., 110; Harnage vs. Martin, 242 U. S., 386; Johnson vs. Riddle, 240 U. S., 467; United States vs. Wildcat, 244 U. S., 111. Of course congress cannot impair the jurisdiction by providing that the department's decision is "final," Johnson vs. Towsley; or "conclusive," Gegiow vs. Uhl; or that the department's jurisdiction is "exclusive," Wallace vs. Adams, 204 U. S., 415.

THE POWER OF APPROVAL BY THE DEPARTMENT AND ITS REGULATIONS UNDER THE ACT OF 1913.

It is not claimed by respondents, the department, or the court below, that the power of approval given the department negatives the adoption of the state law or carries any power to set that law aside. It plainly was intended to serve the same purpose as that over deeds to restricted land, under which the department, as here, claims no right to override the substantive law. The power is to ascertain the testator's sanity and to guard against fraud of whatever character. This power of probate is necessary because the department maintains custody of and administers the will until removal of restrictions. As to both deeds and wills the department has issued rules and regulations, but in neither of them is there any attempt to touch any substantive matter; the result is necessarily the state law. That this is so is plainly shown by the Osage Act which provides for exactly the same approval, at the same time providing that the wills are to be made "in accordance with the laws of the State of Oklahoma."

Of course the department, purely as a moral and arbitrary matter, might and should refuse unqualifiedly to approve a will which on its face attempts to violate the terms of the patent and the mandate of congress, but it is under no legal obligation in that behalf, for the approval is not addressed to any question of law.

The appendix hereto sets out in full the regulations. They do not attempt to touch any substantive matters, showing that they assume the state law. Indeed, they specifically accept the state law of descent and distribution and execution as governing, and, as we shall show in discussing the opinion of the Court of Appeals, they do not negative the state law in any respect.

DISCUSSING THE OPINION OF THE COURT OF APPEALS.

The opinion positively ignores the adoptive statutes and it further says that appellant claims that *notwithstanding* the act of 1913 and the regulations he is entitled to the benefit of the provision at bar: The truth is his claim is that he is so entitled *because of them*. This is the fundamental error all through the opinion. It states that plaintiff's case rests upon the assumption that before the act of 1913 restricted Indians could make a will under section 8341, for it says:

> Appellant claims that the act of congress (1913) assumes that this section of the Oklahoma laws of descent and distribution shall *continue* in force as to wills of Indians authorized to be made by the act of congress because it did not expressly provide how such lands should be devised. We cannot agree with this contention. Before the enactment by congress this testatrix could not have made a will conveying the land because of the prohibition in the last proviso of this section 8341 of the Oklahoma laws.

We have consistently said that prior to the three acts of wills restricted allottees had no power of devise and that there is no fundamental application of the state laws at all; and the last sentence of the quoted portion emphasizes the court's underlying error, for it shows clearly that the court was under a misapprehension by assuming that plaintiff was contending for that very thing.

The opinion is next based upon the assumption that unworthy and designing persons sometimes contract marriage with Indians with a view to obtaining their property, hence the allottee was given the right to "select devisees" and the department the right to "disallow" any will. We assume the first quotation means that the allottee has the right to

override the state law as adopted. The right to "disallow" a will, if any, is not germane to the case at bar since we are attacking an approved will. If the court means by that expression that the power of approval is something more than the power of probate, that is, that it was intended as a sledge to compel the allottee to do its will in the matter of disposition, the testamentary grant is worthless and the disposition at death might as well have been left to the department; and it is the first suggestion of the kind that has been made.

However, we suggest that white people are quite as often married with the same object, and the local codes do not provide against it. It is more unlikely that congress intended that ungrateful and unfaithful husbands and wives could deprive their spouses of a share in the property which they had helped to protect and improve by investment of money or sweat of the brow. The approval was given in part to protect married people in each other's property against fraudulent wills, as shown by the provision protecting them in the Five Tribes Act. It would seem that insidious references by counsel to the fact that appellant is a white man have had their intended effect.

Another fundamental error all through the opinion is this: It looks abstractly at the act of 1913 without regard to the codes of descent or the other two federal statutes of wills. And this was exactly the error of the Indian Office (see appendix) which is probably due in part to the fact that the Osage and Five Tribes acts are administered in the courts and were therefore not thought of by the department.

The court next bases its opinion upon department regulation No. 55, which it incompletely quoted as follows:

> Where the distribution made in the will differs from

that which would otherwise be made under the state law—

legal heirs are to be given a hearing before the will is approved. Let us fully quote the material portion of the rule:

> Where the distribution made in the will differs from that which would otherwise be made under the state law *of descent, if the testator had died intestate.*

The rule has no relation at all to the question at bar. Its plain purpose was to provide for a trial of *devisavit vel non* at the suit of heirs at law. It is addressed to the same situation as No. 53, the latter providing for an investigation and the former for the trial. The court stopped at the word "law" in No. 55 and said that the rule shows that the state law is not regarded as controlling by the department, while in truth the reference to the state law does not apply to devises under that law at all; it applies to heirs at law.

The court further says it is more reasonable to suppose that the right granted by the act was uniform (meaning as between Indians in different states) instead of a grant subject to the varying laws of the states in which the land is located. This conclusion is sharply opposed to the practice of the department in other respects under the wills act, the intent of Congress to apply the local law, and to the case of Jefferson vs. Fink. It moreover assumes that nothing is necessary but the bare right to devise, while in fact there must be a governing law. The court also assumes that the wills are never filed in the local probate courts, while in fact that is done when restrictions are removed. It is perhaps not inappropriate to say that appellant did not have the benefit of oral argument before the court, while appellees were so represented.

IT IS UNNECESSARY HERE TO ALLEGE THAT PLAINTIFF IS IN POSSESSION.

It is sometimes said that this allegation is necessary in a bill to remove cloud in order to show there is no remedy at law by ejectment. But there are several reasons which excuse it here. Defendants have waived the point by not objecting to the jurisdiction on that ground:

> "The necessity for alleging possession in plaintiff may be waived by failure, either by demurrer or answer, to ~~raising~~ waive objection, on that ground, to the jurisdiction;" 32 Cyc., 1357. Mosier vs. Momsen, 13 Okla., 41.

But there is also a fundamental reason why the allegation is unnecessary here: The bill shows that all parties to the suit are tenants in common, and as the allegation of possession is necessary only to show that plaintiff has no remedy in ejectment against defendants (Chaplin vs. Holmes, 27 Ark., 417; Johnson vs. McChesney, 33 Ill. App., 528; Alton Co. vs. Buckmaster, 13 Ill., 201), it cannot apply here because one tenant in common cannot have ejectment against another, since they are all entitled to possession, and the possession of one is that of all; Scott vs. Scott, 85 Ky., 390. It is also declared that if the bill alleges a fee simple title in plaintiff, as here, the allegation of possession is unnecessary; Gage vs. Kauffman, 133 U. S., 471, citing 1 Dan. Ch. Pr., Chap. 6, par. 5; Dist. of Columbia vs. Hufty, 13 D. C. App., 177.

Moreover, there is an independent ground of equity jurisdiction to correct the mistakes of executive officers; Johnson vs. Towsley; U. S. vs. Wildcat, supra; so that if the department has power to determine heirs in the Quapaw, the bill may rest on the ground. Equity also has power

to distribute a decedent's assets. And as the land is restricted, the department collects and distributes the rents and profits upon a trust. So the case is drawn into equity on those grounds.

CONCLUSION.

It is respectfully suggested that the decision of the Circuit Court of Appeals be reversed and the case remanded with directions to overrule the motion to dismiss the bill.

HENRY C. LEWIS,

PAUL A. EWERT,

Solicitors for Appellant.

APPENDIX

Regulations Relating to the Determination of Heirs and Approval of Wills, Approved September 13, 1915

49. Wills, how filed for approval.—The will of any Indian of the class who may make such an instrument shall be filed with the superintendent having jurisdiction over the property proposed to be disposed of by such will, who shall aid and assist the Indian as far as possible in the drawing of the paper writing, so that it will clearly and unequivocally express the wishes of the maker; but the superintendent must not in any way influence the person in the disposition he may wish to make of his property.

50. Wills, how prepared.—The execution of the will, whenever practicable, should conform to the laws of the State in which the testator is domiciled, where personal property is bequeathed, and to the laws of the State where the real property is located when such property is devised; and the will should be submitted in duplicate.

51. Wills, form of.—The will should state (1) name, age, residence, and tribe of the maker, if an Indian; (2) names, ages, and relationship of the devisees; (3) the specific description of the restricted or trust lands attempted to be disposed of in order that examination may be made in the Indian Office by reference to its records to determine whether the land is actually allotted or inherited by the testator, whether a patent has previously been issued therefor, or whether the land has been sold under any law applicable thereto; (4) in case of personal property a description of the property bequeathed which will enable the Indian

Office to identify it; (5) and signed at the end thereof by the maker in his own handwriting, if he can write, otherwise by mark and thumb print, and in all cases to be witnessed by two or more adult witnesses who can write. The will should be written on one side only of heavy paper and preferably in letter size.

52. Form must be used when practicable, exception.—The form prescribed for wills as above must be adhered to strictly, except in cases where the will is filed with the superintendent after the death of the testator, or must be made under circumstances which make it impracticable for the form to be used, as in cases of extreme sickness or otherwise, when delay would defeat the purpose of the maker. Superintendents must endeavor in all cases where practicable to insist and see that the regular form of will is followed.

53. Wills, superintendent's report on submission to Indian Office.—The superintendent or any other officer, before submitting such will, shall inquire fully into the mental competency of the Indian; the circumstances attending the execution of the will; the influences which induced its execution; and the names of those entitled to share in the estate under the state law of descent; and where the distribution proposed by the will has cut off natural heirs and disposed of all the estate to persons who would not otherwise inherit there should be obtained from the testator, if living, an affidavit setting forth the reasons for so disinheriting such natural heirs. In case the testator is dead endeavor should be made to ascertain from the most reliable source the reasons for making such disposition. The competency of all devisees and legatees to manage their own affairs should be investigated. The report must be accompanied with a certificate of appraised value of the land.

54. Will to be returned to agency. Codicil subsequently executed if desired.—In case the will is filed and approved before the death of the testator

it will be returned to the superintendent or other officer for safekeeping, and after the death of the testator should again be forwarded for record in the Office of the Commissioner of Indian Affairs. The Indian should be advised that the filing and approval of his will will not prevent its subsequent modification or revocation by the testator, but any such modification or revocation can be made only with departmental approval. The report of the superintendent or other officer submitting the will should contain in full detail the information required by these regulations and a specific recommendation respecting its approval.

55. Heirs, when to be determined before will approved.—In cases where a will has been made and the testator has died before submitting the will for the consideration of the department a hearing shall be held to determine his or her legal heirs, and where the distribution made in the will differs from that which would otherwise be made under the state law of descent, if the testator had died intestate, the legal heirs shall be notified of the existence of the will and its provisions and be given full opportunity to object to its approval.

Approved September 13, 1915.

THE DEPARTMENT'S DECISION.

37189

PROBATE
39016-1916
E S M
Estate of Fannie
Crawfish Blanset.

October 20, 1917.

The Honorable,
The Secretary of the Interior.

Sir:

I have the honor to transmit herewith action for re- hearing and brief in support filed by Mr. Henry C.

Lewis, local attorney for Mike Blanset, in the matter of the will of Fannie Crawfish Blanset, deceased Quapaw allottee No. 95-97, whose will was approved by the Department under date of October 9, 1916.

It is contended in the brief submitted by the attorney in this case that Section 8341 of the Oklahoma Code which provides that a woman may not bequeath more than two-thirds of her property away from her husband, is in pari materia with the law of descent in the same code, and is, therefore, an integral part of that law; that the State law of descent is written into the acts of June 25, 1910 (36 Stats. L., 853), and February 14, 1913 (37 Stats. L., 678), and that Section 8341 created an indefeasible heirship in the husband. It is stated by the attorney that "Section 8341 positively says what may be willed and what may not be willed, and it follows as night the day that what cannot be willed descends at law."

The Act of June 25, 1910, *supra*, Section 1, provides in part: * * * (Ante.)

Section 2 of this act provides: * * * (Ante.)

The Act of February 14, 1913, *supra*, provides in part: * * * (Ante.)

As stated in Office letter of June 8, 1917, as approved by the Secretary June 16, 1917, in connection with this case, "The language of this statute (the act of February 14, 1913) is clear that a person possessing property held under trust or restrictive fee patent has the right to dispose of such property by will, subject only to the approval of the Secretary of the Interior." It is believed also that a person has the right to dispose of such property in its entirety, and that the restrictions placed by state laws on the testamentary disposition of property do not affect an Indian's trust or restricted property.

If this is true, therefore, it is immaterial whether or not Section 8341 of the Oklahoma Code is or is not a statute of descent since the property in question is disposed of under the will and there are no heirs to

determine in accordance with the State law of descent.

The Office sees no reason for recommending a different action than that taken by the Department in its approval of Office letter of June 8, 1917.

Respectfully,

E. B. MERITT,
Assistant Commissioner.

10-VR-12
Approved October 30, 1917.
(Signed) S. G. HOPKINS,
Assistant Secretary.

Office Supreme Court, U. S.
FILED
APR 4 1921
JAMES D. MAHER,
CLERK

No. 244

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1920.

MIKE BLASSET, *Appellant*,

v.

OSCAR CARSON, *as guardian etc., et al.*

REPLY BRIEF FOR APPELLANT.

No. 244

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1920.

MIKE BLANSET, *Appellant*,

v.

OSCAR CARDIN, *as guardian etc., et al.*

REPLY BRIEF FOR APPELLANT.

Appellees' counsel and counsel for government have one point in common: They bestride the case by a colossal man of straw, which is an assumption that appellant is asking for a fundamental application of the state law and for its dominance over federal law. The brief for appellant is perfectly clear in its admission that the case rests wholly upon the will of congress. The point is simply this: That, as said in Chestnut v Capey—and it is needless to dwell upon the fact that a governing law is as necessary for one tribe as for another—congress, in giving the power to devise without expressly providing a governing sub-

stantive law, intended the state law to apply unless it is in conflict with some special and express provision in the federal statute, such as the approval of full-blood wills in the Five Tribe act. And that it exactly what was said in Walker v. Brown, in which the state law prohibiting devise of inalienable property had to give way to the federal law which had for its single purpose that very thing.

And there is a significant negative feature in common between the briefs and the decision below for none of them faces the several adoptive acts except counsel for appellees who lightly disposes of this the controlling question by an attempted distinction between "succession" and "descent," upon the theory, forsooth, that a share which descends despite the will is the former and not the latter. Of course the words are synonymous, the former coming from the civil law. And we are interested to see that in the code of counsel's own state of Oklahoma (1910) chapter 82 is entitled "Wills and Succession"; that Art. IV of that chapter is sub-entitled "Succession"; and that section 8417 et seq. under that sub-title are headed "Descent and Distribution."

And the same brief would have the court believe that appellant is contending that congress adopted section 8341 in its entirety and quotes Walker v. Brown to disprove it which, as appellant's brief also plainly shows, is another man of straw. If the indefeasible share provided by section 8341 is a part of the law of "descent and distribution," or if one who takes that share is an "heir," or if that share is a part of the law of wills as adopted, appellant's case is made.

Answering the Suggestion That Congress Prescribes Different Treatment For Different Tribes.

This is admitted as to protective and administrative matters but not as to devolution and transfer. And nothing further is needed on this point than the general allotment act of 1887, which applies to every tribe in the country as to which the legal title to the reservation had not passed and which prescribes a blanket adoption of the state law of descent and distribution. The case of LaMotte v. U. S., cited on the government brief, p. 7, does not touch any question of descent. It is addressed solely to the *time* of removal of restrictions and if we are asked to admit differences in Indian legislation in that behalf we unhesitatingly do so. And the deadly parallel would appear quite vitiated by section 2 of the act of 1913 which gives the secretary the right to remove restrictions from devisees and heirs immediately upon the death of the allottee (p. 33, main brief).

Appellees' counsel also says we may not look to the legislation governing other tribes, yet we find him harping on Walker Brown (which, with Brock v. Keifer, was brough to light by appellant's counsel) to make his case, while that case admittedly involves only Five Tribes legislation. But we assume the question foreclosed by this court's action in Jefferson v. Fink in looking to the legislation of all tribes, notably the general allotment act, to determine the course of descent in the Creek Tribe.

As to Construction Afforded by the Regulations.

We vigorously challenge the statement that the regulations are based upon the view that the department is not bound by the state laws of descent. They repeatedly affirm the state law without distinction between defeasible and indefeasible descents. That those who framed the regulations might not have known of the difference would only make the case stronger for appellant. And there is another fundamental error in the government brief: It is said that the secretary may approve a will regardless of whether the disposition is in accord with state law. We so admit, for the approval has nothing on earth to do with the determination of heirs nor could that approval in any event destroy a title cast by congress. It is true the secretary, after he approved the will at bar, said by the Indian Office letter that appellant is not an heir, but that is another matter. If the will was fairly executed he had to approve it or the entire disposition would have failed, for the testatrix died before the approval, unless he could make a qualified approval. But in any event we find a code of descent and a law of wills solemnly adopted by congress, with no power in any one to set it aside. And lest it be thought from the brief of counsel for appellees that the department has a hand in the disposition, we quote from Rule 49:

> "The superintendent must not in any way influence the person in the disposition he may wish to make of his property."

Of course the allottee comes in contact only with the superintendent in making the will.

The government brief admits that Osage wills must be in accord with state law, yet we find exactly the same power of approval as to those wills. And inasmuch as appellee's counsel relies upon the regulations for his law of wills we append those issued by the department as to Osage wills, which are precisely of the same import as those under the act of 1913. The latter are only what the secretary, by the same token, could and would have issued, without express authority in the statute, in order to exercise his power of approval. The truth is there is nothing in either set except what is necessary to make the will and to an intelligent finding as to whether it was fairly executed so that it might pass approval. *There is not a sign of any substantive law or rule of property.* Not only do those regulations affirm the state law of descent and distribution (Rules 53 and 55), but they expressly say the execution shall conform to the state law whenever practicable (Rule 50). The qualification is simply a loose, departmental expression since the conformity in execution is simply and wholly a matter of the number of witnesses, of which any Indian agent would naturally and necessarily know.

And to show that conformity in execution is the practical result of the regulations we are just informed by the Indian Office that allottees invariably devise their unrestricted property, if any, which is subject only to the state, in the same will with their restricted property, in which event the department immediately files the will in the state court, collecting the income, if any, from the restricted property. Of course the will

here devises only restricted property and is therefore in the custody of the department awaiting removal of restrictions. Its execution is in strict accord with state law. However, we are concerned here only with a question of descent which congress has fixed according to state law. The only function the department has as to the will is to remove restrictions from the devisees under the power given in the act of 1913 or await the expiration of the time mentioned in the allotment act. Until either is done the only other function in case of a patent like that at bar, which requires no subsequent or final conveyance, is to collect the income, if any, and distribute according to the will. Neither the land nor income is subject to debt or lien, so there is no involved process of administration.

Answer to Other Arguments.

That the department, in administering wills under the act of 1913, applies the substantive law of the state in all other respects is not denied by the government brief, and the statement in appellant's main brief that the department so acts was made with the acquiesence of the Indian Office. And counsel stands independpliesently responsible for the statement. Either this should be denied by government counsel or they must admit a startling difference of opinion with the department. This situation emphasizes the inconsistent attitude of the department whose decision denies this substantive rule of state law, at the same time applying all others.

And if the contention that the state law of wills applies because none other was supplied is an "unusual rule for the construction of a statute," the government must share the opprobrium, as must the very carefully written opinion in Chestnut v. Capey (p. 22, main brief). If government counsel were asked for an opinion whether a will under the act of 1913 in a given state violates the law against perpetuities, or whether one of its provisions created an executory devise or a contingent remainder, where would they look for the law? Not to the regulations, for it is not there. Not to the face of the act of 1913, for it is not there. If they were asked by what law the "heirs" of a homesteader (Act of June 3, 1896, 29 stats., 197) as the quoted word is there used without more, are to be determined, we are quite sure their answer would be the state law because congress, although having plenary authority, provided no other. So as to divorce laws to ascertain whether one is a husband or wife of a homesteader, or even of a restricted allottee. And we think that in so doing counsel would not be guilty of unusual construction. Like the opinion below, the brief assumes that nothing is necessary but a naked power to devise. If that be so, then the work of practical lawyers who have framed the substantive law of wills for the various states have indeed done an idle thing. Instances are found in which congress did not expressly provide for a code of descent in allotment acts (main brief, p. 16); in such case how does the land descend but according to state law by necessary implication?

Assuming, arguendo, that congress did not adopt the share at bar as a part of the law of wills, there is no doubt that it adopted the state law of descent and distribution by the act of 1904. And as the share at bar is a limitation on the grant of power in the state statute of wills it must be in pari materia with that power; so we have in any event the grant of that power by the act of 1913 in pari materia with the undeniable adoption of 1904, which constitute a replica of the Oklahoma statute of wills except for the inhibition against devise of inalienable property. If it be said that in spite of its letter the act of 1904 contemplated only conditions as they existed at that time and therefore not the testamentary power, then it must have been that congress by the act of 1913 deliberately took away the marital portion.

Respectfully submitted,

HENRY C. LEWIS,
PAUL A. EWERT,
Solicitors for Appellant.

Osage Lands.

Regulations made in pursuance of the act of April 18, 1912 (Public, No. 125), entitled "An act supplementary to and amendatory of the act entitled 'An act for the division of the lands and funds of the Osage Nation of Indians in Oklahoma,' approved June 28, 1906, and for other purposes."

* * * * * * *

SECTION 8. Wills executed under the provisions of this section must conform to the laws of Oklahoma, but in order to become valid they must be approved by the Secretary of the Interior, either before or after the death of the testator. The superintendent of the Osage Agency shall, upon application, render all necessary assistance to allottees in drawing their wills, informing and advising them as to the law and their rights thereunder, but under no circumstances shall he endeavor to influence the manner of testamentary disposition. It is not necessary, however, that such will be drawn before or in the presence of the superintendent or other officer of the Indian service. The allottees should be fully advised that the filing and approval of a will will not prevent its modification by codicil or its entire revocation by the testator if he sees fit so to do; but all modifications by codicil and all new wills made after the revocation of old ones must be approved by the Secretary of the Interior. In case a will is filed and approved before the death of the testator it will be returned to the superintendent for safe-keeping, and after the death of the testator it should be filed in the office of the probate court of Osage County.

It shall be the duty of the superintendent in submitting a will for approval to inquire fully into the mental capacity of the testator, the circumstances attending the execution of the will, the influences that may have induced its execution, and as far as known the names of those entitled to share in the estate under the general laws of descent; and in cases where the distribution proposed differs from the general laws of

descent the reasons, if known, for the disposition of the property as proposed. In forwarding a will the superintendent should make a specific recommendation respecting its approval.

R. G. VALENTINE,
Commissioner.

JUNE 26, 1912.
Approved:
SAMUEL ADAMS,
First Assistant Secretary.

In the

Supreme Court of the United States

OCTOBER TERM, 1920

MIKE BLANSET,
Appellant

vs.

OSCAR CARDIN, as guardian, etc., et al.,
Appellees.

No. 244

On Appeal from the United States Circuit Court of Appeals for the Eighth Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

Subsequently to Brock v. Keifer the provision at bar has been applied to a restricted Osage allotment.

In the Estate of John Ross, deceased Osage restricted allottee (the restriction of course makes the allotment fundamentally subject only to the federal adoptive acts) the County Court for Osage County, Oklahoma, (Case No. 1523) allowed the

widow the benefit of the provision at bar as against the husband's will (approved by the Secretary) which attempts to exclude her from any share in the ~~allotment~~ estate; see p. 24 main brief.

In addition to the argument presented in the main brief, the undersigned desires to direct the attention of this court in all earnestness to another reason why the circuit court of appeals should be reversed.

The Quapaw Indians were allotted their lands under and pursuant to the provisions of the Act of March 2, 1895, (28 Stats., 907), which is set forth in full on page 9 of appellant's main brief, and in effect provides for the issuance of a patent in fee simple to Quapaw allottees, with no other restriction whatsoever than the restriction upon alienation for the period of twenty-five years.

Appellant is a white man and was married to Fannie Crawfish, a Quapaw Indian, on August 3, 1906, in Ottawa County, Oklahoma, and up to the time of the death of Fannie Crawfish Blanset, lived with her as her husband upon the allotment given to her under the above act of congress, and they occupied 160 acres thereof as their homestead.

This court has expressly held in the case of Levindale Lead & Zinc Co., v. Coleman, 241, U. S., 431, that the restriction upon alienation of land allotted to Indians under a similar patent, does not follow the land into the hands of a white man, a non-member of the tribe, who inherits the same. The patent construed in that case was one issued

to an Osage Indian and was of the fee simple character such as is here under consideration. In that case, the court there held: (Page 438):

> "But the fact that a non-member takes in the right of the deceased member is not enough to subject him to restrictions which are plainly imposed for the protection of members. It is urged that the restrictions, by virtue of their terms, were to run with the land until they expired by limitation or were removed, but restrictions would not run with the land unless they were attached. And even where they had attached they would run only according to the intendment of the statute. We find no indication of an intent that they should apply to lands, or an interest in lands, which had come lawfully into the ownership of white men who were non-members of the tribe."

Again, at page 440, it is said:

> "Our conclusion simply is that the Act of 1906 placed no restrictions upon the alienation of land, or undivided interests in land, of which white men who were not members of the tribe became owners."

The effect of the above holding is that where an Indian having restricted lands is married to a white person and subsequently dies, the restrictions

upon alienation of the lands of which the Indian dies seized do not follow and attach to the lands which are inherited by the surviving white spouse. This would be the case whether the Indian died testate or intestate.

Applying the law to the case at bar, it must necessarily follow that the husband could not be disinherited by his wife under the acts of congress hereinbefore quoted, giving her the power to make a will, by reason of the fact that the act became inoperative in the very instant of time designated by the death of the testator. The restrictions against alienation expired in the very instant of the death of the wife and in that very instant, if for no other reason than the above, the provisions of Section 8341 became operative, and by the terms thereof the wife was powerless to disinherit her husband.

WHAT IS A WILL?

A will is not a conveyance.

> "An instrument giving any present interest before the death of the maker cannot be a will."

40 Cyc., p. 1074;
Adams v. Lansing, 17 Cal., 629;
Jones v. Morgan, 13 Ga., 515x.

> "A will is a disposition of property to take effect *on or after the death of the owner.*"

40 Cyc., 995.

Blackstone defines a will as:

> "The legal declaration of a man's intentions of which he wills to be performed *after his death.*" 2 Blackstone Comm. 499.

Jarman on Wills, p. 11, defines a will as:

> "An instrument by which a person makes disposition of his property to take effect *after death.*"

Gardner on Wills, paragraph 1, defines a will as follows:

> "The expression, in the manner required by law, and *operative for no purpose until death,* of that which one may lawfully require to be done after his death."

In Reagan v. Stanley, 11 Lea. (Tenn.) 216-22, the Supreme Court says that:

> "A will is a voluntary disposition of property in a mode recognized by law *to take effect after death.*"

Again:

> "A will takes effect from the death of the testator whenever executed, although de-

livered to the devisee before that time." 40 Cyc. 1074.

This court has declared a will to be:

> "The legal declaration of a man's intentions which he wills to be performed after his death."

Smith v. Bell, 31 U. S., 68 (6 Peters 68).

Prior to the act of congress approved February 14, 1913, no allottee of Quapaw Agency could make a will disposing of a restricted allotment. The courts frequently held such an attempt an alienation in the case of Indians of the other tribes who attempted to dispose of inalienable lands by will. The act of February 14, 1913, gives the allottees of Quapaw Agency, who were allotted their lands in fee simple with the restriction against alienation for a period of twenty-five years, the right to alienate those lands *at death* by will. It conferred no other right or any greater power. The greatest stretch of legal imagination could not say that congress by that act intended to give the allottees of Quapaw Agency the right to convey and alienate lands *prior* to death. It simply provided a means whereby those allottees might dispose of their property *after death* by means of a will.

Bearing in mind that the sole authority of congress to enact the law of February 13, 1914, giving the allottees of Quapaw agency the power to make wills, rests upon the inalienable character of the

land allowed to be devised, it necessarily follows, under the decision in the Levindale case, that Congress limited the provisions of the act to cases where the restrictions upon alienation did not cease with death. In other classes of land or allotments the act is inoperative.

Therefore, the approval of the will here in question by the secretary gave it no legal effect as far as that portion of the estate was concerned which descended free and clear of restrictions to appellant. The wife could not dispose of, by will, that portion of her estate which under Section 8341 descended free of restrictions to the appellant in the very instant of time in which the will itself became operative.

In the very instant of the death of the wife the restrictions against alienation passed away and the federal laws ceased to act on that portion of the lands which descended to appellant—the restrictions did not follow the land. Therefore, the act of congress became inoperative and the will of the wife became inoperative pro tanto as to the one third of the property descending to appellant under the state law. The will did not become effective as a conveyance until the very instant of the death of the wife and in that very instant the federal statute became inoperative, because death removed the restriction from the one third descending to the husband.

If the secretary had any power at all under the federal law, under this state of facts he should have declared the will operative only as to that

portion thereof devising lands to the Indian heirs after the share thereof which descended to the husband under the laws of Oklahoma had been declared to be in the husband irrespective of the will. In other words, the will was valid as to a part thereof and invalid as to a part thereof, and the legal effect of the approval of the will could not possibly deprive the husband of that portion of the land which descended to him free and clear of restrictions.

By **PAUL A. EWERT,**
Solicitor for Appellant.

No. 246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

MIKE BLANSET, APPELLANT,

VS.

OSCAR CARDIN AS GUARDIAN, ETC., ET ALS., APPELLEES.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEES.

A. C. [illegible],
Solicitor for Appellees.

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No. 244.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

MIKE BLANSET, APPELLANT,

VS.

OSCAR CARDIN AS GUARDIAN, ETC., ET ALS., APPELLEES.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEES.

STATEMENT.

A very comprehensive statement of fact in the case at bar appears at pages one to five inclusive of appellant's brief, so it is not deemed advisable to again cover that feature of the case in the brief of the appellees.

BRIEF OF ARGUMENT.

Counsel in his brief at page six, sets forth seven assignments of error, the first of which is inclusive and decisive of all questions involved in the case. The assignment reads as follows:

> "The court erred in refusing to hold that appellant is heir at law to an undivided one-third interest in and to the estate of his deceased wife, Fannie Crawfish Blanset, by virtue of the adoption by Congress of the first proviso of Section 8341, Compiled Laws of Oklahoma."

From a casual reading of this assignment, one would infer that Congress had adopted Section 8341 of the Compiled laws of Oklahoma, 1910, which reads as follows:

> "Every estate and interest in real or personal property to which heirs, husband, widow or next of kind might succeed, may be disposed of by will; provided: That if no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman, while married, bequeath more than two-thirds of her property away from her husband. Provided further, that no person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath same by will."

Question in Controversy.

If Congress did adopt the foregoing section, I am ready to concede that the court erred in this case, however, this is just the point in controversy, and a determination of this question will decide the case, and to a discussion of that point this brief will be largely confined.

From the statement found in appellant's brief it has been noted that Fannie Crawfish Blanset is a Quapaw Indian and that the lands in question are restricted Quapaw Indian lands and are not subject to alienation; that the Statutes of Oklahoma expressly provide that no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath the same by will (last proviso Section 8341 Revised Laws of Oklahoma, 1910). Thus as far as the state law is concerned, Fannie Crawfish Blanset was absolutely precluded from devising her restricted Indian lands and absolutely lacked testamentary capacity, either under the Federal Statute or the Oklahoma Statute, insofar as her restricted lands were concerned.

The Oklahoma Statute not only did not grant her the power to make a will but expressly withheld it from her insofar as her restricted lands were concerned and unless we found authority elsewhere, granting her testamentary capacity with respect to her restricted lands, her estate would have descended under Section 8418 of the Revised Laws of Oklahoma, 1910, same being the section on descent and distribution in force in Oklahoma at this time which counsel for appellant contends has been

adopted by Congress by implication and with this contention I have no quarrel, however, I do most seriously insist that Section 8341 heretofore quoted, being a Section of the Law of Wills and Succession, and under which counsel seeks to recover in this case has never been adopted either by express statutory enactment or by implication.

If I might be permitted to make an observation, I think counsel's chief difficulty in this case is that he does not distinguish between the law of Descent and Distribution and that of Wills and Succession, the necessity for one and the lack of necessity for the other.

A uniform law on Descent and Distribution is imperative and absolutely necessary in an orderly and just administration of human affairs and property rights in connection therewith, while it is not so imperative, if imperative at all, that a statute on "Wills and Succession" be in force or effect as to all or any particular set of individuals and particularly that set of individuals whom Congress has said is incompetent to manage their affairs without supervision of the State or Government. The right to devise is a right granted by the state and the right is no broader than the grant and nothing can be read into the grant by implication.

The Federal Grant to Quapaws of Right to Will.

Congress, however, recognizing the status of the Quapaw Indian with respect to restricted lands and recognizing that they were denied by Acts of Congress and by the laws of the State of Oklahoma, the right to

dispose of restricted land by will, legislated on this matter and adopted the Act of February 14, 1913 (37 Stat. 678), which reads as follows:

> "Any persons of the age of twenty-one years having any right, title or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the secretary of the interior; provided, however, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: Provided, further, that the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is hereby authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the state wherein the property is located; provided, further, that the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole

> or in part from time to time as he may deem advisable, or use it for their benefit; provided also, that sections one and two of this Act shall not apply to the Five Civilized Tribes or the Osage Indians,"

which gave the Quapaw Indians the only power they had to make a will with respect to his restricted lands. This Act provided, among other things, that no will so executed, should be valid or have any force or effect unless and until it was approved by the Secretary of the Interior, and that the Secretary of the Interior might approve or disapprove the will, either before or after the death of the testator, and in case where a will had been approved and it was subsequently discovered that there had been fraud in connection with the execution or procurement thereof; the Secretary of the Interior was authorized within one year after the death of the testator to cancel the approval of the will, and that the property of the testator should thereupon descend or be distributed in accordance with the laws of the state wherein the property was located. Thus we find Congress adopting the law of "Descent and Distribution of Oklahoma" in the instant case for the Quapaws, but not the law of "Wills and Succession," and it will be seen that Congress fully covered the manner and method by which and through which, restricted Quapaw land could be willed or devised and only in the event that the will is disapproved or no will made does the state law enter into the devolution of a Quapaw Indian's restricted property.

Prior to the enactment of the Act of February 14, 1913, the Quapaw could not will his restricted land, he

had no inherent right to make a will of this estate and it was only by virtue of this grant of power that he was enabled to make a will of his restricted land. Clearly, Congress having authority to make the grant, had authority to limit that grant in such a manner as it saw fit and impose such conditions in connection therewith as it thought justified, and the state legislature would be powerless to limit, control or abridge the right and authority of the Congress of the United States or the Government of the United States in handling, dealing with or legislating for or on behalf of its Indian wards. In fact, this is a matter which the government, and rightfully so, has very carefully and jealously reserved to itself as the recognized guardian of its Indian's wares from the beginning of Indian affairs.

The lands in question are restricted agains alienation for the very purpose of permitting the Government of the United States to supervise the manner and method of alienation and device, unhampered by the state law of conveyancing or devising by will.

Same Question Before Supreme Court of Oklahoma.

Contrary to appellant, the Supreme Court of the State of Oklahoma has expressly held that Congress did not adopt Section 8341 of the Complied laws of the State of Oklahoma of 1910, being the section upon which appellant relies for relief in this case. This was held in the case of *Walker* v. *Brown*, 43 Oklahoma, at page 144, which involved the last proviso of said section, "no person who is prevented by law from alienating, conveying

or incumbering their property while living shall be allowed to bequeath the same by will." The land involved in this case was the homestead allotment of Lizzie Bruner, deceased, a half blood Seminole Indians, who had made a will, under an Act of Congress similar to the one in the instant case and while she was laboring under the disability imposed by the laws of the State of Oklahoma, by Section 8341 and it was contended in that case as in the instant case that the power of Lizzie Bruner was limited, restricted and controlled by the state, Statute 8341, and that by reason of said section she lacked testamentary capacity, the contention of counsel in that case, being set forth in the opinion, at page 145 and by reason of the fact that it so closely follows the contention of the counsel for appellant in the instant case, I quote it in full, as follows:

> "The testatrix in this case had no right of alienation by will which she could not be deprived of in common with all other citizens of the State of Oklahoma. The Congress simply turned her loose, gave her the right all others enjoyed, and she was to enjoy it only to the extent and under such regulations as the other citizens of the State of Oklahoma enjoyed it. If it was such a right that she could not be deprived of by the State of Oklahoma, then we must conclude that a citizen of the State of Oklahoma is not protected by its laws for the reason that that citizen is an Indian and therefore in the greatest need of that protection. The legislation by the State of Oklahoma was general, it covered all similarly situated, it simply provided that if for any reason a testator is not competent under the law to alienate his property while living he cannot alienate it by will. If this does not apply

> to an Indian, it brings about a very peculiar condition of affairs. Prior to the Act of 1909, *supra*, a male infant over eighteen years of age could not sell his real estate, but could dispose of it by will. Now he cannot dispose of it by will for the reason that he cannot sell it. The law is good, it performs a splendid mission; then why should its protection be denied to a citizen because he is a poor Indian in dire need of all the protection that can be thrown around him?"

The Supreme Court of Oklahoma held in this case in unmistakable language that Section 8341 had no application whatever and was not in force as against or pertaining to the Indians of the Five Civilized Tribes, speaking with reference to the subject at page 146 of the opinion, as follows:

> "The reason the state cannot legislate for an Indian of the Five Civilized Tribes is that Congress has reserved the right to legislate for him as a dependent people, and this guardianship does not cease when an allotment is made and the allottee become a citizen of the United States. As was said by Mr. Justice Day in *Marchie Tiger* v. *Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738:
>
> "* * * Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indians' lands inherited from allotees as shown in this case; that in the present case, when the Act of 1906 was passed, the Congress had not released its control over the alienation of lands of full blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full blood

Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease; and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian.'

This court has repeatedly held that Acts of Congress supplant the laws of Oklahoma in relation to Indians, that certain state laws which are applicable to every other citizen are not in force as against or pertaining to the Indians of the Five Civilized Tribes, and that we have here, respecting some matters, two classes of citizens and two legislative sovereignties. *Jefferson* v. *Winkler*, 26 Okla. 653, 110 Pac. 755; *Kirkpatrick* v. *Burgess*, 29 Okla. 121, 116 Pac. 764; *Wilson* v. *Morton et al.*, 29 Okla. 745, 119 Pac. 213. The Congress in the exercise of this power, has undertaken to legislate for the Indians along lines which it deems will subserve their best interests and it is not within the province of the court to inquire whether it performs this duty well or ill. In the instant case, and others similiar to it, the Congress has seen fit to permit the Indians to dispose of certain of their allotted lands by will, whilst it prohibits all other conveyances, alienations, or encumbrances.

It is obvious that, if the state law were given the construction contended for, it would have the effect of interfering with the policy of Congress toward the Indians in the matter of the alienation of their allotted lands. In our opinion the legislature of the state did not intend the act to have any such effect."

As the Supreme Court of Oklahoma said in this opinion, if the state law were given the construction contended for it, it would have the effect of interfering

with the policy of the Congress toward Indians in the matter of the alienation of their allotted lands. A will or devise of real property is in the nature of an alienation thereof and that Congress had full power and authority to and did reserve unto itself the right to legislate or to make regulations respecting Indians, their lands, property or other rights, without limitation or restriction on the part of the state, cannot be questioned.

Section 1 of the Enabling Act, pursuant to which Oklahoma was admitted into the Union of the United States, provided in part as follows:

> "Provided, that nothing contained in said constitution shall be construed to limit or impair the rights of property pertaining to Indians in said territories, so long as such rights shall remain unextinguished or to limit or affect the authority of the Government of the United States, to make any law or regulation, respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

Mr. Justice Hays, speaking for the Supreme Court of Oklahoma, in the case of *Jefferson* v. *Winkler*, 26 Oklahoma, page 662, and quoting the above section of the enabling act, said:

> "The people of the state, acting through their representatives and delegates to the constitutional convention, were required to, and did, by an ordinance irrevocable, accept the terms and conditions of said act. It is unnecessary to comment upon the extent of limitations of the authority over the lands and property of such Indians, that is, by said provision of the Enabling Act reserved to the

> United States Government; for, whatever be the extent of that authority or its limitations, we think it cannot be questioned that the said authority reserved is sufficient to retain in the government of the United States jurisdiction over the restricted lands of said Indians, to determine and provide how and in what manner such restrictions shall be removed; and that, until such restrictions are removed the lands of such Indian minor allottees are not within the jurisdiction of the Probate Courts of the state with power in said courts to order the sale thereof for any purpose. Since the power to remove such restriction is wholly with Congress it may say upon what terms and conditions they will be removed and under the supervision of what court or officer the sale of same shall be made."

Thus following the reasoning of the Supreme Court in this case, it was wholly within the power of Congress to say under what terms and under what conditions the Quapaw Indian might will his land and in the exercise of its jurisdiction it was competent for Congress to further provide for the supervision of some court or officer to approve and carry the will into effect. This was just what was done in the instant case. The will of Fannie Crawfish Blanset was made under the supervision and direction of the Secretary of the Interior and was approved by the Secretary of the Interior and consequently must have met all the requirements of the Secretary of the Interior both as to form and substance and operates in the nature of a conveyance of the lands in question upon testator's death with the consent and approval of the secretary.

Reason for the Act of 1913.

That Congress intended and had in mind in passing the legislation in question that the Indian might be disposed to will his land contrary to the law of descent and distribution of the State of Oklahoma, cannot be questioned, otherwise the legislation permitting the Indian to will, would have been purposeless and would have given the Indian no greater right that he already had. As to what the intent of Congress was in passing the Act of February 14, 1913, in question, can be easily ascertained. It is a matter of common knowledge that special Acts of this kind, are initiated for the benefit of the class of individuals whom they affect and are, in nine cases out of ten, prepared and submitted by the class or group affected. In this case it is a group of Quapaw Indians, under guardianship of the Secretary of the Interior. The Secretary of the Interior appreciating the necessity of giving the Quapaw Indian the authority to make a will doubtless, and as a matter of fact, in the instant case, requested this legislation and doubtless prepared the bill for same. In any event the secretary prepared the regulations for carrying into effect this Act, which regulations are found as an appendix to appellant's brief filed herein. Section 53 of the regulations with reference to wills, provides as follows:

> *"Wills, Superintendent's Report On Submission To Indian Office.*— The superintendent or other officer, before submitting such will, shall inquire fully into the mental competency of the Indian; the circumstances attending the execution of the will; the inferences which induced its execu-

tion; and the names of those entitled to share in the estate under the state law of descent; and where the distribution proposed by the will has cut off natural heirs and disposed of all the estate to persons who would not otherwise inherit, there should be obtained from the testator, if living, an affidavit setting forth the reason for so disinheriting such natural heirs. In case the testator is dead endeavor should be made to ascertain from the most reliable sources the reasons for making such disposition. The competency of all devisees and legatees to manage their own affairs should be investigated. The report must be accompanied with a certificate of appraised value of the land."

This section shows conclusively that the secretary had in mind that in a great many cases the Indian allottees would disinherit natural heirs, as in the instant case, and in fairness to all concerned provided, that in the event the testator should cut off natural heirs, the superintendent or other officer before submitting the will for approval, shall inquire from the testator of living, as to her reason or his reason for disinheriting such natural heirs, and in case the testator be dead, endeavor should be made to ascertain from the most reliable sources the reason for making such disposition. Thus the secretary realized and anticipated the very condition, which we have here, realized and was keenly alive to the fact that the Act of Congress of 1913 conferred an unlimited power upon the allottees to will their estates and carefully guarded against an unjust exercise of this power by the allottees, to my mind throwing a greater safeguard around the disposition of the Indians' property and making possible a far more equitable disposition of

the property to the parties who should rightfully receive the same, than the arbitrary mandates of Section 8341. Congress and the secretary doubtless had in mind that designing white men might marry Indian women of advanced age with large estates for the sole and only purpose of receiving an undivided one-third interest therein, upon the death of such Indian woman, thereby sharing in something which he did not help to create or even to preserve to the exclusion of the blood relation, which would neither be just nor equitable and this was no doubt one of the reasons for the enacting of so liberal a statute, yet liberal as it may be, the interest of every deserving husband and every deserving wife is amply protected under Rule 53, which requires close scrutiny on the part of the secretary, before approval of a will, which disinherits or cuts off the natural heirs.

It is evident in the instant case, that the secretary in approving the will in question found that Mike Blanset, appellant herein, was not worthy or deserving of receiving any part of Fannie Crawfish Blanset's estate, and in the exercise of its policy of protecting its Indian wards approved the will, cutting off a non-deserving white man. That it is the policy of the Department of the Interior and of Congress in the exercise of its guardianship over its Indian wards to protect and shield its wards against designing white persons, is unquestioned and from authorities heretofore quoted it is clear and evident that Congress has the right to pass such legislation as it deems advisable to carry out this protection, without limitation or restriction by the states. This right is ex-

pressly reserved to the United States Government by Section 1 of the Enabling Act heretofore quoted, which expressly provides that nothing contained in said Constitution shall be construed to limit or impair or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights.

If we are to follow the contention of appellant in this case, and this Honorable Court were to hold that Section 8341 was a limitation on the Act of Congress of February 14, 1913, the authority of the Secretary of the Interior to approve the will is abridged and limited and conditioned upon said will being made in compliance with said section and properly executed only, the policy of the Government in dealing with and protecting its Indian wards is thereby hampered and impaired and the authority of Congress to pass legislation in the interest of the Indian as a dependent people is destroyed, by the Legislature of the State of Oklahoma.

That this cannot be done is expressly held by the Supreme Court of the United States in an opinion by Mr. Justice Day in the case of *Marchie Tiger* v. *Western Investment Company*, 221 United States 286, 31 Supreme Ct. 578, 55 L. Ed. 738, and cases from the Supreme Court of the State of Oklahoma heretofore cited.

That Section 8341 was not applicable to the devising of restricted Indian lands was again held by the Supreme Court of Oklahoma in the case of *Brock* v. *Keifer*, 157 Pac. 89, wherein the Supreme Court of Oklahoma said:

"The proviso of Section 8341 Revised Laws of 1910, does not apply to wills executed by members of the Five Civilized Tribes of Indians devising their allotted lands."

Policy of Congress as to Indians and their allotments. State Law of devolution and transfer invariably adopted.

Under the foregoing head at page ten of his brief, appellant pleads for uniformity of devolution of titles between whites and Indians in the same state, and asks that the court require that it be shown that Congress intended to eliminate Section 8341 and the State Law of "Wills and Succession" of Oklahoma, by language too plain to admit a doubt.

In effect, he argues under this heading that unless the law of "Wills and Succession" of Oklahoma is read into the Act of Congress under which the will in question was made (Act of February, 14, 1913—37 Stat. 678) Congress will have provided a special code of descent and distribution, and that chaos will prevail of impossible proportions.

In this connection, counsel overlooks the fact that in the absence of a will, as the law now stands, both Federal and State, the Quapaw Indians' land descends under the law of "Descent and Distribution" of the State of Oklahoma just the same as that of his white brother, and that in order to determine the title to real estate where a will has been made, it is necessary to look to the specific instrument just as much as to a deed of conveyance, both as to the Indian and the white man, and

this situation would not be changed nor would we have greater uniformity in titles through descent and distribution or under wills, if we were to hold that the will of the Quapaw Indians' restricted land was limited and abridged by a State Statute.

In other words, the title to property passed by will is fixed by that instrument and not by the State Law; it vests in the party named in the will both as to Indian and white man, and the fact that the spouse of the white man under the law of Oklahoma must always come in for an undivided one-third interest does not determine who shall get the other two-thirds or say that the spouse may not get more than one-third or in any way fix a uniform devolution of property affected by a will. Regardless of whether or not the Oklahoma Law of Wills and Succession limits or affects a Quapaw Indian's will, we have the same uniformity of devolution of titles as to both whites and Indians in Oklahoma.

This Court has Declared the Foregoing Policy.

Under the foregoing heading at page 12 of his brief, counsel quite extensively discusses the case of *Jefferson* v. *Fink*, 247 U. S. 288, decided June 30, 1918, and with his discussion of this case I have no quarrel, even if it was applicable to the case at bar and it is not.

This case merely held that it was the invariable policy of Congress to have restricted allotments descend according to the law of the state in which located, in the absence of express legislation on the matter.

In the instant case, Congress has expressly legislated on the law of "Descent and Distribution" as to Quapaw allotments in the very Act under consideration, being the Act of February 14, 1913 (37 Stat. 678), wherein it is provided that in the event the secretary disapproves the will "the property of the testator shall thereupon descend or be distributed in accordance with the laws of the state wherein the property is located." It follows without argument that a will disapproved is the same as no will made, and that the law of descent in one case would be applicable to the other.

Counsel uses the *Jefferson* v. *Fink*, case for the purpose of criticizing the statement of the Circuit Court of Appeals in this case, where the court said "the general policy of Congress has been to maintain control over Indians and the disposition of their allotments according to the ideas of what is beneficial for them rather than subject them to State Laws" (Opinion R. 18).

I am unable to see the force of counsel's criticism. This court in *Jefferson* v. *Fink*, merely said that it was the policy of Congress to have uniform laws as to descent and not that the head of a family could not sell his land to whom he chose; not that the head of a family could not devise his land to those whom he saw fit, and not that it was the policy of Congress that certain relatives of the deceased should have certain portions of decedent's property regardless of a manifest desire of decedent expressed by way of will approved by the secretary that other relatives should have it; not that we

would have uniformity by permitting the state to say to whom he might devise.

In any event, in every case of will, we have to look to the will to see who owns the property, and there is no such thing as uniformity of devise either as to the white man or the Indian.

As I have before stated, counsel entirely loses sight of the difference between "Descent and Distribution" and "Wills and Succession" in the devolution of the title of property and the necessity for uniformity in laws of descent and distribution as to all citizens of the state as a whole, and his argument if followed, would entirely destroy the effect and purpose of a will.

The Osage and Five Tribes Statutes with reference to Wills and Succession as enacted by Congress.

Counsel at pages 15 to 24 inclusive of his brief, discusses the various Acts permitting Indians of the Five Civilized Tribes and of the Osage Nation to make wills and attempts to read the provisions of these Acts into the Quapaw Act for the purpose of attempting to show that Congress adopted the law of Wills and Succession of Oklahoma, being Section 8341 heretofore quoted, as a part of the Quapaw Act.

I do not care to reply to this argument at length as I have heretofore quoted cases from the Supreme Court of the State of Oklahoma, expressly holding that the State Statute was not applicable in two cases presented to the Oklahoma Supreme Court, passing upon wills at-

tempted to be made under the Five Tribes Act (*Brock* v. *Keifer*, 157 Pac. 89; *Walker* v. *Brown*, 43 Okla. 144).

Suffice it to say that the three classes of Indians, known as the Five Tribes, the Osage Indians and the Quapaw Indians are as widely divergent with respect to their conditions, property, necessities and social status as citizens of the United States as the two ends of the rainbow, and recognizing this fact, in no instance has Congress ever attempted to pass legislation applicable to all three or any two of the three, but recognizing their widely divergent conditions, both as to property and citizenship, has in the only intelligent way it could do, passed separate and independent Acts accordingly as to which tribe it was legislating for or on behalf of.

The Five Tribes are all enrolled and have a degree of blood and Congress has seen fit to turn those of certain degrees of blood entirely loose, set them free, place them under the supervision and control of the State Laws of Oklahoma just the same as any other citizen, white or black, while the affairs of others it still supervises.

It has treated the Osages and their property separately, taking into consideration the peculiarities of the Osages and their problems and likewise the Quapaws, and in no instance do we have an Act applicable to both, and to my mind it is a far stretch of imagination to say that what Congress had in mind that the legislation passed for the benefit of the Quapaws should be construed in the light of express legislation passed for the benefit of the Osages, and likewise that of the Five Civilized Tribes.

Intent and purpose of the federal statutes giving the Indians the testamentary power.

Under the foregoing head, counsel for appellant launches into an elaborate discussion as to the intent and purpose of Congress generally in granting the power of devise to Indians generally. Statutes are discussed collectively and in an abstract sort of way, and the particular statute in question is entirely ignored.

In view of the fact, as has heretofore been shown that Congress has legislated specially for the various Indian Tribes, I think it important that the statute under consideration be discussed as we are endeavoring to arrive at what Congress intended by this particular statute.

A discussion of all the statutes on wills would only be misleading and confusing and have no force in arriving at a proper solution of the instant case.

Counsel says that Congress in initiating the statute in question was concerned with only two abstract ideas: "To give power to devise and to have the allotment distributed according to local law, not with the detail of distribution in all its varying provisions as between wards of all states; indeed, it is probably the framers thought little or nothing about them * * * Having, in prior statutes and in the statutes of wills themselves, adopted the local law with no exceptions, Congress abstractly gave the power to devise."

I submit that Congress did not abstractly give the Quapaw Indians the power to devise as the most casual

scrutiny of the Act in question will disclose. Quoting further from appellant's brief at page 28, counsel says:

"But more than that; if Congress did not include in the statute of wills like that at bar because it did not express them, then it so excepted every other provision of the state law of wills and there is no law at all by which this vast wealth can be administered."

The Act of February 14, 1913 (37 Stat. 678), in part reads as follows:

> "Any person of the age of 21 years having any right, title or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States, shall have the right prior to the expiration of the trust or restricted period, and before the issuance of a fee simple patent or removal or restrictions, to dispose of such property by will *in accordance with regulations to be prescribed by the Secretary of the Interior.*"

Not in accordance with the State Law of Oklahoma; not a part of the property of the Indian but the whole thereof and in accordance with regulations to be prescribed by the Secretary of the Interior. Certainly the State Law of Oklahoma of Wills and Succession could not be more clearly excepted than by the language of this Act.

Counsel says that if we do not take into consideration the state law that we have no law for administering this vest wealth, but in making this statement, he entirely overlooks the fact that the very Act granting

authority to make the will says that the allottee can only dispose of his property by will in accordance with regulations of the Secretary of the Interior. Regulations were prescribed which are found in the appendix of appellant's brief, and an examination of these regulations disclose that the regulations which were authorized by the Act in question provided:

First. How the will shall be filed for approval with the Indian Agent (Sec. 49).

Second. How the will shall be prepared; the execution of it; and that the execution shall conform to the laws of the state in which the testator is domiciled WHENEVER PRACTICABLE, which itself excludes the theory that the substantive law of wills of Oklahoma shall apply; and need not be executed in accordance with the laws of the state, of necessity (Sec. 50).

Third. The form of the will (Sec. 51).

Fourth. Section 52 provides for an exception in following the form prescribed.

Fifth. Section 53 provides for the report of the will to the Indian Office, and states the duties of the various officers in connection therewith, provides what shall be done in the event natural heirs are cut off.

Sixth. Section 54 provides for the execution of codicils after approval.

Seventh. Section 55 provides for a hearing on wills not approved before the testator's death.

Thus, a complete and elaborate procedure is provided by Congress and the regulations of the secretary

for every step necessary to be taken, from execution down to final approval, and nothing is left for the Probate Courts of Oklahoma, or the Law of Oklahoma on Wills and Succession, either as to procedure or the substance of the will itself. The Act of 1913 certainly contains a very positive limitation which goes to the very essence of the power to make a will.

To read into this Act of Congress, the first proviso of Section 8341 of the Laws of Oklahoma as requested by appellant is to say that the State of Oklahoma can pass legislation affecting Indian lands and titles which will take precedence over that passed by Congress, and in the event of conflict, the state law will prevail. That this cannot be done, one needs to go no further than Section 1 of the Enabling Act, heretofore quoted, pursuant to which Oklahoma was admitted into the Union, which in part says:

> "Provided, that nothing contained in said Constitution shall be construed to limit or impair the rights of property pertaining to Indians in said territories so long as such rights shall remain unextinguished or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

The power of approval by the department and its regulations under the Act of 1913.

Discussing the above topic at page 36 of his brief, appellant says "it is not claimed by the respondents, the

department of the court below that the power of approval given the department negatives the adoption of state law or carries any power to set that law aside. It plainly was intended to serve the same purpose as that over deeds to restricted land, under which the department, as here, claims no right to override the substantive law."

The respondents cannot speak for the department of the court below, but speaking for themselves, do contend that the Act itself coupled with the power of approval is contrary to, overrides and supersedes the state law. The power of approval in all cases of alienation or devise of restricted Indian lands goes to the substance of the alienation or devise in the first instant and to the form of execution in the second instant.

It is a matter of common knowledge that the alienation of restricted Indian lands requires the approval of the Secretary of the Interior, not that the alienation may be in proper form, that the deed may be properly executed, but that the department shall supervise, control and limit the substance of the instrument of alienation. The department must pass on the question of whether or not it is advisable to alienate the land in question, whether or not the Indian is getting a proper consideration for his land, whether or not the grantee is a proper person to have in the locality of other Indian lands and many other things enter into the transaction concerning which the department deems the Indian incompetent to decide.

To adopt appellant's theory would be to say that Congress was concerned more that the grantee got a

good title by a proper conveyance than that its ward received the proper consideration for his land. The same thing is true of a will.

Before the secretary should approve a will, he must satisfy himself that the Indian is devising his land, free from external and improper influences, that the devisees are proper parties to receive this land, that improper influence has not been brought to bear upon the testator, to make said persons devisees, in fact, the secretary's mind coupled with that of the Indian, and the act of the secretary coupled with that of the Indian, is what it takes to make a valid conveyance or a valid devise. The Indian declares himself through his deed or through his will, and the secretary declares himself by his approval of the deed or will of the Indian, and it takes the combined declaration of both the Indian and the secretary to make a valid instrument in either case, and thus the power of approval is one of substance and not of form as contended by appellant.

Better stated, the position of the Secretary of the Interior in matters of alienation and of wills is that of a guardian and not an administrative officer as contended by appellant. It is not a question of overriding substantive law, but a question of the secretary exercising a power granted by the Acts of Congress, free and unhampered by state laws.

Supplemental Brief of Appellant.

Appellant files a supplemental brief herein and attempts to make a point which is not discussed in the main brief.

In substance, he says that under authority of the case of *Levindale Lead & Zinc Co.* v. *Coleman*, 241 U. S. 431, appellant being a white man, inherited an undivided one-third interest in the lands in question, free and clear of all restrictions or supervision of the Department of the Interior instantly upon the death of Fannie Crawfish Blanset, therefore the department has no supervision or jurisdiction over one-third of the lands in question. This is a novel argument to say the least, and is based upon the assumption that title passed by way of descent and distribution under the state law to appellant faster than it passed to appellees under the will, in other words, we had a race and appellant won, appellant riding the State Statute of Descent and Distribution and appellees riding the will drawn by the Federal Act of 1913.

If this contention be true, then there is no such thing as casting descent by will, for immediately upon death of the testator, all property passes to his legal heirs who immediately become the owners thereof and there is nothing left to pass under the will, as the testator cannot will something he does not own, title having passed out of him at his death.

It is respectfully submitted that this argument is too fallacious to warrant further comment.

Conclusion.

It is respectfully submitted that the decision of the United States Circuit Court of Appeals for the Eighth Circuit should be affirmed.

A. C. WALLACE,
Solicitor for Appellees.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

MIKE BLANSET, *Appellant*,
v.
OSCAR CARDIN, *as guardian of* JESSE DAYLIGHT, *a minor, et al.*
No. 244.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

Comes now the Solicitor General and submits this brief on behalf of the United States because of its interest, as guardian of the Indians, in the subject-matter of this suit, which involves the power and duty of the Secretary of the Interior with respect to matters relating to Indian property.

STATEMENT.

Fannie Crawfish Blanset, a Quapaw Indian, died in Oklahoma on February 22, 1916. By a will (Pl. Ex. A, R. 9, 10) executed the day before her death, and which was subsequently approved by the Secretary of the Interior (R. 11), she disposed of certain property in Oklahoma of which she was seized. The property with which we are concerned in this suit was land, part of which had been allotted to Fannie

as a member of the Quapaw tribe; and part of which she had inherited from her mother who had received it as a Quapaw allottee. These lands were restricted as to alienation.

Her right to make testamentary disposition of this realty was conferred by the Act of February 14, 1913, c. 55, 37 Stat. 678, which amended section 2 of the Act of June 25, 1910, c. 431, 36 Stat. 855, and provided:

> That any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States, shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is hereby authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon

> descend or be distributed in accordance with the laws of the State wherein the property is located: * * *.

This suit was brought by Fannie's husband, Mike Blanset, to whom she willed the sum of five dollars, and proceeds upon the theory that the plaintiff, as husband, under section 8341 of the Revised Laws of Oklahoma of 1910, was entitled to an undivided one-third interest in all the property of which Fannie died seized.

That section reads as follows:

> What May Be Disposed of by Will.—Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will. Provided, that no marriage contract in writing has been entered into between the parties: no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband; provided further, that no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will.

It is asserted that in approving a will pursuant to the authority given him under the Act of February 14, 1913, *supra*, the Secretary is bound to notice and conform to the laws of the State governing testamentary disposition, and that he can not properly disregard them and approve a will making a disposition in conflict therewith.

The question presented in this case, therefore, is: Whether the Secretary of the Interior, in approving the will of a Quapaw Indian, as he is authorized to do under an Act of Congress, must conform to the laws of the State of which the Indian is a resident (here Oklahoma), or whether he may disregard them and approve the will if it make such a disposition as in the Secretary's judgment is wise and proper.

We think there cannot be much dispute that this Act vested in the Secretary of the Interior the power to approve a will of any Indian coming within the terms of the Act, regardless of whether the disposition provided for in the will was consistent with the applicable laws of the particular State in which the testator lived.

This must necessarily be so, because the property which the Act authorized the Indian to dispose of by will was property held in trust by the Government or property as to which the Government had imposed restriction on alienation. It was, therefore, property in which the United States had a governmental interest and consequently could not be affected by State legislation. It was also clearly within the competency of Congress to provide for a variation or modification of the restrictions which it had itself placed upon the property. When it did so, as it did in this Act of February 14, 1913, by permitting an Indian, in a sense, to dispose of it, the power thus given did not become trammeled by the enactments of any State.

In other words, the will of Congress as to the disposition of the property was supreme and overrode any State legislation. If it had been intended that the Secretary of the Interior should see that there was conformity with the State law in the disposition of this kind of property by will, Congress could readily have expressed its wish. It did not do so; on the contrary, the very language of the statute indicates a different intention, for in providing for the revocation or cancellation of the approval of a will in case of fraud in its execution or procurement, it is expressly declared that if there is such cancellation of approval the property of the testator "*shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located.*"

There would be no need of such a provision were the laws of the State otherwise applicable to testamentary disposition as well as to descent and distribution.

The appellant, however, contends that inasmuch as Congress in its enactments relating to the *descent and distribution* of Indian property provided that the state law should be followed, it is a necessary consequence that when it granted to Indians the privilege of devising their property by will, Congress intended that the state law respecting wills should also be followed—*and this although nothing was said in the Act concerning conformity.* The position of appellant seems to be that the *presumption* is that Congress so intended and the contrary must be

clearly demonstrated by the one asserting it. In other words, it will be presumed that Congress meant a certain thing although it did not say so.

This is an unusual rule for the construction of a statute. Yet it might find support could it be plainly shown that the omission in the statute was at variance with a long established and consistently followed policy. *United States* v. *Sweet*, 245 U. S. 563, 572. Such, however, is not the situation here. No such policy is found. The legislation respecting wills of Osages, cited by appellant to support his position, only makes plainer that Congress intended a distinction, for in the Osage Act it is specifically declared that the disposition by will shall be "in accordance with the laws of the State of Oklahoma."

Congress, in dealing with different tribes of Indians has legislated with special regard to the peculiar characteristics and conditions of each. Thus with respect to the Five Civilized Tribes, blood status is made the test of competency, while as to the Osages it is left to the discretion of the Secretary of the Interior, based upon the personal attainments of the individual Indian.

Again, this court, in *La Motte* v. *United States*, decided January 24, 1921, recognized a distinction in the policy of Congress respecting the right given to different tribes to will property and the effect thereof.

In that case it was held that an approval by the Secretary of a will of a competent Osage resulted in the removal of restrictions upon the devised property when the devise took effect. A distinction was

pointed out between the Osage Act and the very Act here in question. Referring to the Osage Act, the court said:

> This provision is broadly written, is in terms applicable to restricted lands and funds, and enables the Indian to dispose of all or any part of his estate by will, in accordance with the state law, if his will be approved by the Secretary. True, it does not say that a disposal by an approved will shall put an end to existing restrictions, but that is an admissible, if not the necessary, conclusion from its words. After its enactment the Secretary of the Interior construed it as having that meaning, and it was administered accordingly in that Department up to the time of this suit. And that Congress intended it should have that meaning is at least inferable from a general act of the next session respecting wills by Indian allottees and their approval by the Secretary (c. 55, 37 Stat. 678); *for that act, while providing that "the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period,"* expressly excepted the Osages from its reach. [Italics ours.]

Thus, with respect to the Act here in question, the omission of reference to the state laws is significant, and the presumption is that the omission was intentional. *Williamson* v. *United States*, 207 U. S. 425, 458, 459, 460.

The practice of the Interior Department has been in accord with the views here expressed. In approv-

ing wills, that Department has not felt bound by state legislation making specific requirements with respect to disposition of property. The regulations are based upon that view. Such as are material here are set forth as an appendix to this brief (page 10). Regulations by the Secretary were expressly authorized under the Act of February 14, 1913, *supra*. As they are not inappropriate, unreasonable, or inconsistent with the Act, they should be held valid. *United States* v. *Morehead*, 243 U. S. 607; *La Motte* v. *United States*, *supra*.

CONCLUSION.

As the courts below were, in our judgment, clearly correct in the disposition made of this case, we submit that the decree appealed from should be affirmed.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

LESLIE C. GARNETT,
H. L. UNDERWOOD,
Special Assistants to the Attorney General.

MARCH, 1921.

APPENDIX.

EXCERPT FROM REGULATIONS RELATING TO THE DETERMINATION OF HEIRS AND APPROVAL OF WILLS, EXCEPT MEMBERS OF THE FIVE CIVILIZED TRIBES AND OSAGE INDIANS, APPROVED SEPTEMBER, 13, 1915.

49. Wills, how filed for approval.—The will of any Indian of the class who may make such an instrument shall be filed with the superintendent having jurisdiction over the property proposed to be disposed of by such will, who shall aid and assist the Indian as far as possible in the drawing of the paper, writing so that it will clearly and unequivocally express the wishes of the maker; but the superintendent must not in any way influence the person in the disposition he may wish to make of his property.

50. Wills, how prepared.—The execution of the will, whenever practicable, should conform to the laws of the State in which the testator is domiciled, where personal property is bequeathed, and to the laws of the State where the real property is located when such property is devised; and the will should be submitted in duplicate.

51. Wills, form of.—The will should state (1) name, age, residence, and tribe of the maker, if an Indian; (2) names, ages, and relationship of the devisees; (3) the specific description of the restricted or trust lands attempted to be disposed of in order that examination may be made in the Indian Office by reference to its records to determine whether the land is actually allotted or inherited by the testator,

whether a patent has previously been issued therefor, or whether the land has been sold under any law applicable thereto; (4) in case of personal property a description of the property bequeathed which will enable the Indian Office to identify it; (5) and signed at the end thereof by the maker in his own handwriting, if he can write, otherwise by mark and thumb print, and in all cases to be witnessed by two or more adult witnesses who can write. The will should be written on one side only of heavy paper and preferably in letter size.

52. Form must be used when practicable, exception.—The form prescribed for wills as above must be adhered to strictly, except in cases where the will is filed with the superintendent after the death of the testator, or must be made under circumstances which make it impracticable for the form to be used, as in cases of extreme sickness or otherwise, when delay would defeat the purpose of the maker. Superintendents must endeavor in all cases where practicable to insist and see that the regular form of will is followed.

53. Wills, superintendent's report on submission to Indian Office.—The superintendent or other officer, before submitting such will, shall inquire fully into the mental competency of the Indian; the circumstances attending the execution of the will; the influences which induced its execution; and the names of those entitled to share in the estate under the State law of descent; and where the distribution proposed by the will has cut off natural heirs and disposed of all the estate to persons who would not otherwise inherit there should be obtained from the testator, if living, an affidavit setting forth the reasons for so disinheriting such natural heirs. In case the

testator is dead endeavor should be made to ascertain from the most reliable sources the reasons for making such disposition. The competency of all devisees and legatees to manage their own affairs should be investigated. The report must be accompanied with a certificate of appraised value of the land.

54. Will to be returned to agency. Codicil subsequently executed if desired.—In case the will is filed and approved before the death of the testator it will be returned to the superintendent or other officer for safe-keeping, and after the death of the testator should again be forwarded for record in the Office of the Commissioner of Indian Affairs. The Indian should be advised that the filing and approval of his will will not prevent its subsequent modification or revocation by the testator, but any such modification or revocation can be made only with departmental approval. The report of the superintendent or other officer submitting the will should contain in full detail the information required by these regulations and a specific recommendation respecting its approval.

55. Heirs, when to be determined before will approved.—In cases where a will has been made and the testator has died before submitting the will for the consideration of the department a hearing shall be held to determine his or her legal heirs, and where the distribution made in the will differs from that which would otherwise be made under the State law of descent, if the testator had died intestate, the legal heirs shall be notified of the existence of the will and its provisions and be given full opportunity to object to its approval.

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